

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
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CHAMBERS OF JUDGE BAZELON

United States Court of Appeals
For the
District of Columbia Circuit

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BRIEF AND JOINT APPENDIX FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15487

WILLIAM P. ROGERS, APPELLANT

v.

CHENG FU SHENG & LIN FU MEI, APPELLEES

232

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

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United States Court of Appeals
For the
District of Columbia Circuit

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No. 15487

QUESTIONS PRESENTED

In the opinion of the appellant, the following question is presented:

1. Are appellees—deportable aliens who resided in Formosa and came to the United States from Formosa and who owe allegiance to the Chinese Nationalist Government—deportable to Formosa?

(1)

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JURISDICTIONAL STATEMENT

This is an appeal from a final order of the United States District Court for the District of Columbia granting plaintiff-appellee's motion for summary judgment. This Court has jurisdiction of this appeal under 18 U.S.C. § 3731 (1952).

STATEMENT OF THE CASE¹

Appellees were born in China, joined the Nationalist Chinese Air Force at the end of World War II, and went to Formosa with the Nationalist Forces in 1948 and 1949 when the Chinese mainland fell under communist control. Both were members of separate groups of Chinese Nationalist Air Force officers which were admitted to this country for eleven weeks of pilot training in 1952 and 1953. When their groups returned as scheduled to Formosa, appellees deserted and remained here. They were ordered deported to Formosa in 1953 (J.A. 28).

¹ Some of the facts related below are taken from a prior appeal involving the same appellees, *Sheng and Mei v. Barber*, 269 F. 2d 497 (9th Cir. 1959).

Deportation was withheld pending final action of their applications for adjustment of their status pursuant to Section 6 of the Refugee Relief Act, 67 Stat. 403 (1953), as amended, 50 U.S.C. App. § 1971d (Supp. V 1958).

The Immigration Service denied relief on the theory that appellees could return to Formosa, the country of their last residence, without fear of persecution on account of their political opinions. Appellees challenged this decision in the United States District Court for the Northern District of California, Southern Division, without success. *Sheng v. Barber*, 144 F. Supp. 913 (N.D. Cal. 1956). On appeal, however, the Ninth Circuit Court of Appeals reversed, and held that appellees were entitled to be considered for Section 6 relief. (269 F. 2d 497 (9th Cir. 1959).) Congress, however, refused to approve the granting of permanent residence to appellees, thus resulting in the final denial of relief under the Refugee Relief Act.²

In the suit below, filed in the District Court for the District of Columbia to review the orders of deportation, appellees contended that they could not be deported to Formosa for the reason that Formosa is not a "country" to which they may be deported within the meaning of the term "country" used in Section 243(a) of the Immigration and Nationality Act, 66 Stat. 212, 8 U.S.C. § 1253(a) (1952) (J.A. 21, 23). Cross motions for summary judgment were filed, and the parties stipulated that in the 1952 Japanese Peace Treaty, Japan renounced all interest in Formosa, and that no subsequent agreement thereafter entered into purported to transfer the sovereignty of Formosa to China (J.A. 26).

The District Court granted summary judgment for appellees, ruling that they could not be deported to Formosa, apparently for the following two reasons: (1) Formosa is not a "country" within the meaning of Section 243 of the Immigration and Nationality Act, which requires that deportation be to a country, rather than a place or territory; and (2) Formosa is not regarded by the United States Department of State as part of China, and therefore, although appellees are deportable to

² See Congressional Record, September 11, 1959, p. 17586 and H. Res. 384, Report No. 1176, 86th Cong., 1st Sess.

China, they are not deportable to Formosa. This appeal, taken by the Government, followed.

STATEMENT OF POINTS

1. The District Court erred in holding that appellees are deportable only to a "country".
2. The District Court erred in holding that Formosa is not a "country".

STATUTES INVOLVED

Title 8 United States Code, § 1253 (a) and (b) provides:

Countries to which aliens shall be deported—(a) Acceptance by designated country; deportation upon non-acceptance by country.

The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national or, had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within

three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

(b) *Deportation during war.*

If the United States is at war and the deportation, in accordance with the provisions of subsection (a) of this section, of any alien who is deportable under any law of the United States shall be found by the Attorney General to be impracticable, inadvisable, inconvenient, or impossible because of enemy occupation of the country from which such alien came or wherein is located the foreign port at which he embarked for the United States or because of reasons connected with the war, such alien may, in the discretion of the Attorney General, be deported as follows:

(1) if such alien is a citizen or subject of a country whose recognized government is in exile, to the country

in which is located that government in exile if that country will permit him to enter its territory; or

(2) if such alien is a citizen or subject of a country whose recognized government is not in exile, then to a country or any political or territorial subdivision thereof which is proximate to the country of which the alien is a citizen or subject, or, with the consent of the country of which the alien is a citizen or subject, to any other country.

Title 8, United States Code § 1227(a) provides in pertinent part:

Immediate deportation of aliens excluded from admission of entering in violation of law—(a) Maintenance expenses.

Any alien (other than an alien crewman) arriving in the United States who is excluded under this chapter, shall be immediately deported to the country whence he came, in accommodations of the same class in which he arrived, on the vessel or aircraft bringing him, unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper.

* * * * *

ARGUMENT

Introduction

To enforce the various legislative restrictions on the flow of immigrants and foreign visitors to the United States, expulsion and exclusion of aliens is provided for in the immigration laws. Expulsion, commonly referred to as deportation, applies to the alien who is living in this country, but who has no right to remain. Exclusion pertains to those aliens who, although they may or may not physically be in the territory of the United States, are deemed by statute never to have been admitted. See *Leng May Ma v. Barber*, 357 U.S. 185 (1958). It is obvious that without provision for exclusion and expulsion the immigration laws could be openly flaunted.

Expulsion and exclusion are thus instrumentalities by which violations of the immigration laws are remedied. The general scheme looks towards restoration of the *status quo ante* in so far as possible. See *Delany v. Moraitis*, 136 F. 2d 129, 131 (4th Cir. 1943); *United States v. Murff*, 253 F. 2d 941, 943 (2d Cir. 1958). Hence, the exclusion provision requires the alien to be returned to "the country whence he came". 8 U.S.C. § 1227(a) (1952); 66 Stat. 201.

Expulsion, on the other hand, is either to the country designated by the alien, or to the country of his nationality or citizenship, or to the country from which he came, or to the country of his birth, or to the country in which he resided prior to his entry, or to the country having sovereignty over his birthplace, or to any country willing to accept him. 8 U.S.C. § 1253(a) (1952); 66 Stat. 212. Nine alternative places to which an alien may be deported are carefully spelled out in this section. Quite plainly, the legislative drafters intended to leave no loopholes that would enable a deportable alien to frustrate expulsion on the ground that the statute provided no place to which he could be deported. The decision of the District Court enables appellees, aliens who came here from Formosa and who admittedly are here illegally, to do precisely that. The court below, without any legislative history to support its conclusions, ruled that appellees may not be deported to Formosa solely because the court construed the statute to permit deportation only to countries, and viewed the unsettled international status of Formosa as requiring the conclusion that Formosa is not a "country."

I

Appellees may be deported to Formosa

If we are able to demonstrate that Formosa is a country, within the meaning of that word as used in the 1952 Immigration Act, then the judgment of the District Court must be reversed. Or, assuming Formosa is held not to be a country, the judgment below must nevertheless be reversed if we can show that deportation need not be to a "country", but may be to other international subdivisions or entities.

A. Formosa is a "country," within the meaning of Section 243(a) of the Immigration and Nationality Act of 1952

The court below in its opinion devotes much language and discussion to the question of whether or not Formosa is part of China (J.A. 29, 33). In so doing, it misses the point. The issue is not whether Formosa is a part of China, but whether Formosa is a country, within the meaning of that term as used in the 1952 Immigration Act. To say that it is not a country is to construct a new and technical definition, one for which we are unable to discover any precedent anywhere, and with the result that two residents of Formosa who came here from Formosa, and who have always owed allegiance to the Government in control of Formosa, and who have no right to be here, may not be returned to Formosa. Although deportation statutes "should be generously construed. . . . this does not require [the court] to adopt a ridiculous interpretation favoring the alien at all events." *Khan v. Barber*, 253 F. 2d 547, 550 (9th Cir. 1958); *Cf. Jay v. Boyd*, 351 U.S. 345, 346 (1956).

We know of no decisions supporting the reasoning or conclusions of the court below. On the contrary, the courts have consistently refused to narrowly define the term "country".³

A recent illustration, directly in point in this case, is *United States v. Shaughnessy*, 218 F. 316 (2d Cir. 1954). Here the alien contended that he could not be deported to Communist China for the reason that Communist China was not a "country", since the United States did not recognize its government and therefore could not communicate with it. The alien argued that deportation to China should "mean deportation to Formosa or other territories under the control of the Republic of China" (at 318). The court rejected this argument as follows (at 319) (Harlan, J.):

"We cannot agree that the word 'country' in § 243 must be so limited. While it is true that parts of the

³ Confronted with constant changes in both international boundaries and the structure of foreign governments, the courts have liberally construed the term "country" so as to effectuate the purpose of the legislation in which the term country is used. *E.g., United States v. McCandless*, 61 F. 2d 366, 369 (3d Cir. 1932); *United States v. Karnuth*, 63 F. Supp. 727 (W.D.N.Y. 1945).

statute contemplate communication with other countries, that is a far cry from saying that if communication is impossible, the other nation is not to be regarded as a 'country'. Such an interpretation would be an unnecessary departure from the ordinary meaning of the term. Indeed the reference in subdivision (7) of § 243(a) to 'any of the foregoing *places* or countries', clearly indicates that 'country' is not necessarily to be given the limited meaning claimed by the appellant, and we think this is certainly so as to subdivision (3)(4),(5), and (7). . . ."

In its decision the court affirmed the order of deportation to Communist China, but "... taking judicial notice of the hazardous conditions in that area of the world . . . [the court was] constrained to give the appellant another opportunity to cooperate . . . in bringing about his deportation to Formosa or any other territory under the control of the Chinese Nationalist Government." The alien had refused to select Formosa as the country to which he was to be deported, and the court, in its discretion, gave him another opportunity to do so.

This decision is in open conflict with the judgment below. Under Judge Holtzoff's view, appellees are deportable to Communist China, even though they resided in Formosa when they came to the United States and never owed allegiance to the government of Communist China. And even if they wanted to designate Formosa as the country to be deported to, pursuant to the option giving an alien the opportunity to designate a country to be deported⁴ to, they could not designate Formosa, since Formosa is not a country. The Second Circuit necessarily regarded Formosa as a country, as in fact did the alien in that case. In sum the court below ruled that a Formosan who came here from Formosa could not be deported to Formosa, even if he wanted to be deported to Formosa, but may be deported only to Communist China. Surely Congress never

⁴ 8 U.S.C. § 1253a (1952); 66 Stat. 212 provides in pertinent part: "The deportation of an alien . . . shall be directed by the Attorney General to a *country* promptly designated by the alien if that *country* is willing to accept him into its territory" [Emphasis added.]

intended such incongruity. Although this ruling may be helpful to these aliens, it might well cause harsh consequences in future cases.

Another illustration of a case in which the court refused to narrowly construe the term "country", and one in which the facts were far more compelling from the alien's point of view than the instant one, is *Delany v. Moraitis*, 136 F. 2d 129 (4th Cir. 1943). In that case the alien was ordered deported to the Greek Government in exile in England, and contended on appeal that he could be deported only to the territory of Greece. The court affirmed the order of deportation and ruled as follows:

"... The question presented by the appeal, therefore, is whether under the statute, the petitioner must be allowed to remain in this country, where he has no right to remain under our laws, or whether the statute will be complied with if he be returned to the political dominion and control of the country from which he came. We think that the latter is the case, . . .

"It is true, of course, that the term 'country' as used in the statute must be construed, ordinarily, to refer to the territory from which the alien came. *Mensevich v. Tod*, 264 U.S. 134, 136, 44 S. Ct. 282, 68 L. Ed. 591. But a man's 'country' is more than the territory in which its people live. The term is used generally to indicate the state, the organization of social life which exercises sovereign power in behalf of the people. *United States v. The Recorder*, 27 Fed. Cas. page 718, 721, No. 16, 129. Ordinarily the state exercises sovereignty only within the territory occupied by its people; but a different situation is presented when the territory is overrun by its enemies and its government is in exile in the territory of a friendly nation exercising power in international matters in behalf of its nationals. In such case, the government in exile has taken over the only exercise of sovereign power left to the people of the country and is the only agency representing the country with which a foreign government can deal.

"... It appears in this case that the government of the United States recognizes the Greek government functioning in England as the government of Greece and deals with it as such. In the matter of deporting an alien who has come to this country from Greece, the government must deal with the Greek government in England; and when, under agreement with that government, it arranges to return the alien into its power, it is not unreasonable to treat such delivery as a deportation to the 'country' whence he came in accordance with the statutory requirement.

* * * * *

"The purpose of the deportation statute with which we are dealing is to remove from this country an alien who is here contrary to our laws, and place him under the jurisdiction of the political power to which he owes allegiance. If the word 'country' as used in the statute be construed to include the government in exile of a country whose territory has been overrun by the common enemy, the purpose of the statute can be carried out and the alien placed under the jurisdiction of the country to which he owes allegiance and which is charged with his protection. If it be construed as limited to the territory of the nation, which has been thus overrun, the purpose of the statute will be frustrated in cases of this sort; and it will result either that we must suffer an alien who has come from such a country to remain at large in our country contrary to our laws or must support him in prison until such time as he can be returned to the territory now in possession of the enemy. We do not think that any such absurd result could have been within the contemplation of Congress in the passage of the Act; and it is well settled that statutes should be construed, if possible, so as to effectuate the purpose intended and avoid absurd consequences."

Under the holding of this case, appellees are unquestionably deportable to Formosa: first, the United States recognizes the Government on Formosa as the legitimate government of

China, and, second, that is the political power to which appellees owe allegiance. There is, in fact, much more reason to hold appellees deportable to Formosa since appellees came from Formosa and resided there prior to their coming to the United States. Moreover, that government has defacto sovereignty or control over the island of Formosa. None of these factors were present in *Delany v. Moriatis, supra*. The alien there had never lived in England, did not come from England, and the Greek Government had no sovereignty over English land.

The Supreme Court emphasized in *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 5(1932) that reference must be made to the purpose of the particular legislation in defining the term "country":

"The word 'country', in the expression 'foreign country', is ambiguous. It may be taken to mean foreign territory or a foreign government. In the sense of territory, it may embrace all the territory subject to a foreign sovereign power. When referring more particularly to a foreign government, it may describe a foreign State in the international sense, that is, one that has the status of an international person with the rights and responsibilities under international law of a member of the family of nations; or it may mean a foreign government which has authority over a particular area or subject matter, although not an international person but only a component part, or a political subdivision, of the large international unit. The term 'foreign country' is not a technical or artificial one, and the sense in which it is used in a statute must be determined by reference to the purpose of the particular legislation."

The Court thus followed its usual practice of looking to the intent of Congress in order to determine the correct meaning of the word "country".⁵ See also *Faber v. United States*, 221

⁵ Subsequent to publication of Judge Holtzoff's opinion in the instant case (177 F. Supp. 281, D.C.D.C.), Judge Matthews, in written opinion, applied the *Burnett* doctrine of the Supreme Court; specifically rejected the ruling of Judge Holtzoff; and, held that aliens who last entered the United States from Hong Kong, and were thereafter found deportable, may be deported to Hong Kong, as a country from which such aliens last entered

U.S. 649 (1911); *Stairs v. Peaslee*, 18 How. (59 U.S.) 521 (1856); see also *Delany v. Moriatis*, *supra*, at 131; *M/V Non-suco v. Comm. of Internal Revenue*, 234 F. 2d 583 (4th Cir. 1956); *Campbell, et al. v. Barney*, 4 Fed. Case 1157 (D.C.S.-D.N.Y. 1864).

Section 101 of the 1952 Immigration Act (8 U.S.C. § 1101) contains many definitions of the terms used in that Act. The word "country" however is not defined. It must therefore be given its ordinary and usual meaning, bearing in mind the context in which it is used and the purpose of the deportation provision.

WEBSTER'S NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2d ed. 1944) defines country as follows:

- "1. A region or tract of land; a district; as, the north country.
2. The region characterized and limited by some special feature as of scenery, dialect; as the Lake Country.
3. The territory of a nation whether independent or not that is distinct as to name and the character, language, institutions, or historical memories of its people.
4. The land of a person's birth or adoption to which he owes his allegiance; fatherland.
5. The people of a state or district; the nation.
6. Rural regions, as opposed to a city or town."

BLACK, LAW DICTIONARY (4th ed. 1951) describes "country" as follows:

"The portion of the earth's surface occupied by an independent nation or people, or the inhabitants of such territory.

"In its primary meaning 'country' signifies 'place'; and, in a larger sense, the territory or dominions occupied by a community; or even waste and unpeopled

the United States under 8 U.S.C. § 1253(a)(1). In arriving at her conclusion, Judge Matthews reasoned thusly, "The adoption of that rationale [*Burnett*] in the instant case would meet the requirement that the sense in which language is used in a statute must be determined by reference to the purpose of the particular legislation. Moreover, such adoption would tend to achieve and not to defeat the aims of the 1952 . . . Act." *Ying et al. v. Rogers*, — F. Supp. — (D.C.D.C.; C.A. No. 2927-59, decided February 10, 1960). See Joint Appendix, *infra*.

sections or regions of the earth. But its metaphorical meaning is no less definite and well understood; and in common parlance, in historical and geographical writings, in diplomacy, legislation treaties, and international codes, the word is employed to denote the population, the nation, the state, or the government, having possession and dominion over a territory."

Formosa has fixed geographic boundaries and a government having possession and dominion over its territory. The United States regards it, and it is treated, as an international person. Plainly, it meets the concise definition of "country" found in MORRIS, DICEY'S CONFLICT OF LAWS (7th ed. 1958) 30: "'Country' means the whole of a territory subject under one sovereignty to one body of law". That the government of Formosa is sovereign over its territory is undisputable, and, we think, crucial, for sovereignty is the touchstone of all international law. TAYLOR, INTERNATIONAL PUBLIC LAW, § 117 (1901). The fact that its international status may be unsettled because no final treaties have been signed does not in any way detract from its sovereignty or make it any less a country. Surely it could not be contended that there is no such country as The Federal Republic of Germany because a final peace treaty has not been entered into. And it is certainly illogical to permit deportation of an alien to Communist China,* a government the United States does not recognize, but not to Formosa, whose government we do recognize.

If "Formosa" is not a country within the meaning of Section 243(a) of the 1952 Immigration Act then, presumably, it is not a country for purposes of the various other sections of the same Act. This would produce many results that are no less than absurd. For example, under Section 101(a)(15)(H) aliens of distinguished merit and ability are permitted to visit the United States temporarily if they have no intention of abandoning their residence in a "foreign country." If Formosa is not a "country," then no alien from Formosa could be admitted to the United States under the provisions of this Act.

A second example of the incongruous results that must follow if Formosa is not regarded as a country, is that the At-

* Plainly, appellees are citizens and nationals of the government in control of Formosa. *United States v. Murff*, *supra*.

torney General could not establish an Immigration Service Office in Formosa, even though Section 103(a) of the Act authorizes him to establish such offices in "foreign countries".

A third illustration: Section 231(c) authorizes the Attorney General, through Immigration Officers, to record information regarding every resident person leaving the United States by way of Canada or Mexico for permanent residence in a foreign country. One whose destination is Formosa would be excepted from the operation of this section if Formosa is not regarded as a country.

A more glaring example of the absurd consequences that would follow if Formosa were not regarded as a country is that persons illegally attempting to enter the United States from Formosa, and who otherwise would be excluded under Section 237(a) of the Act could not be excluded, since Section 237(a) provides that such an alien "shall be immediately deported to the country whence he came." This would mean that Formosans who have illegally sought entry into the United States could not be deported. But see *Shung v. Murff*, 176 F. Supp. 253 (S.D.N.Y. 1959).

II

Appellees are deportable to Formosa regardless of whether Formosa is a country

The District Court ruled that appellees may not be deported to Formosa because, in its opinion, the statute authorizes deportation only to "a country and not a particular location" (J.A. 29). Although the court stated that Formosa could not be regarded as a "country", nowhere in its opinion does it characterize Formosa, other than to refer to it as a "territory" or "place." The lower court, however, conceded that under the earlier immigration laws it would have been proper to deport appellees to Formosa. The court referred to Section 20 of the Act of February 5, 1917 (39 Stat. 874, 890), which provided that deportation of aliens "be to the country whence they came or to the *foreign port* at which such aliens embarked for the United States . . ." The lower court said:

"Were these provisions in existence in the present statute, there would be no doubt whatever that the

deportation of the plaintiffs to Formosa would be valid. For some reason which does not seem to appear in the legislative history, this provision was not included in the 1952 Act, and thereby was repealed by implication. No doubt that Congress must have had some good reason for abrogating the power of the Government to deport an alien to a specified port by requiring deportation only to a designated country".

We agree that the legislative history fails to disclose any reason for so limiting this deportation provision. We believe, however, that the present statute contains at least the substance of the prior Act, and does authorize deportation to Formosa (the place, or country, from which appellees came to the United States). Aside from the fact that repeals by implication are not to be indulged in lightly, the present statute states in language that could not be clearer that an alien may be deported "to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory".⁷ We see no reason whatever for construing this Section more narrowly than the earlier section referred to by Judge Holtzoff. If anything, the statute actually broadens the scope of places to which aliens may be deported. It permits deportation not only to the specific foreign port from which the alien embarked to the United States, but also to the country in which is located the foreign port. This interpretation is wholly consistent with the legislative history of the Internal Security Act of 1950, subsequent to which the present provision was enacted. The legislative history discloses Congress' concern with the "undeportables" and its intention to *broaden*, not to narrow, the places to which an alien may be deported. S. Rep. No. 1515, Report of the Committee of the Judiciary (1950), pp. 637-8.

We need not go beyond Section 243 of the Act to demonstrate that appellees are deportable to Formosa, for in that Section it is provided that the Attorney General shall direct deportation to certain countries or " . . . (7) if deportation to any of the foregoing *places or countries* is impracticable, in-

⁷ 8 U.S.C. § 1253(a) (2) (1952).

advisable, or impossible, then to any country which is willing to accept such alien into its territory" [Emphasis added].

The "foregoing places or countries" refers to the first six alternatives listed in this Section and *all* use only the term country. The use of the term "place" in Subsection 7 would be redundant if Congress intended deportation be made only to a *country*. It necessarily follows that deportation may be to a "country" or a "place." Surely Formosa is a "place." Compare *Shing v. Murff*, 168 F. Supp. 381 (S.D.N.Y. 1958) holding that an alien may be deported to the British Colony of Hong Kong.

In support of this conclusion, we again quote from the opinion of Justice (then Judge) Harlan in *United States v. Shaughnessy*, *supra*, 218 F. 2d at 319 (here the alien contended that he could be deported only to Formosa and not to Communist China):

"We cannot agree that the word 'country' in § 243 must be so limited. While it is true that parts of the statute contemplate communication with other countries, that is a far cry from saying that if communication is impossible, the other nation is not to be regarded as a 'country'. Such an interpretation would be an unnecessary departure from the ordinary meaning of the term. Indeed the reference in subdivision (7) of § 243(a) to 'any of the foregoing *places* or countries', clearly indicates that 'country' is not necessarily to be given the limited meaning claimed by the appellant, and we think this is certainly so as to subdivision (3), (4), (5), and (7)."

And Judge Learned Hand, in *United States v. Murff*, *supra*, 264 F. 2d at 928, wrote:

"As the relator was born in China, he is a 'subject national' or a 'citizen' of either the Nationalist Government of China, or the de facto Communist Government"

Section 243(a) states that "deportation of such alien shall be directed to any country of which such alien is a subject, na-

tional, or citizen if such country is willing to accept him into its territory."

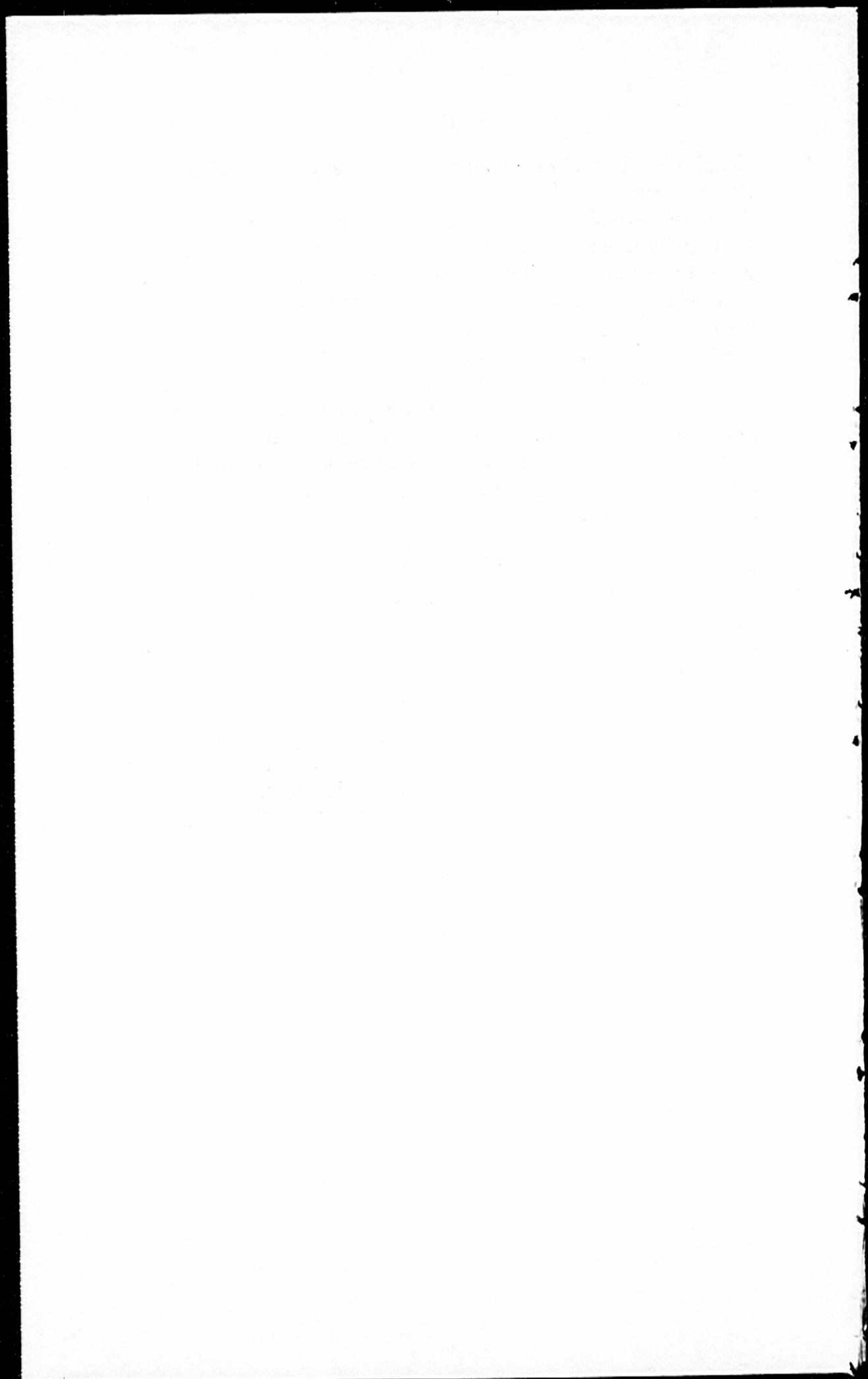
As we have shown, to interpret the term "country" as excluding Formosa is to construe the statute in complete disregard of the plain meaning and purpose of the immigration laws. Not only does it make it impossible to return these aliens to Formosa, from where they came, but it would make it impossible to deport any Formosan who entered this country illegally. By parity of reason, an alien who came from Trinidad could not be deported there. The decision of the court below stands alone, completely out of step with a long line of federal cases uniformly holding that the term country should be reasonably construed by reference to the sense in which it is used and the purpose of the legislation.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the court below be reversed, and the case remanded to the District Court with direction to enter summary judgment for appellant.

OLIVER GASCH,
United States Attorney,
CARL W. BELCHER,
LOUIS M. KAPLAN,
Assistant United States Attorneys.

JOINT APPENDIX



JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

- September 17 Complaint, Appearance, Filed.
September 24 Motion of defendant for summary judgment; P & As in support of and in opposition to pltf's. motion for preliminary injunction Exhibits (5), Filed.
September 24 Motion of pltf. for summary judgment; P & As; c/s September 24, 1959, Filed.
October 6 Opinion (Motion of def't. for summary judgment is denied, motion of pltf's. for summary judgment is granted) Holtzoff, J.
October 13 Order granting motion of pltf. for summary judgment and denying motion of def't. for summary judgment (n), Holtzoff, J.
November 16 Notice of appeal by def'ts. from order October 13, 1959, copy to Wasserman. (No fee, Govt.), Filed.

United States District Court for the District of Columbia

Civil Action No. 2580-59

CHENG FU SHENG, 313 SCOTT STREET, SAN FRANCISCO, CALIFORNIA AND LIN FU MEI, 145 FELL STREET, SAN FRANCISCO, CALIFORNIA, PLAINTIFFS

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

COMPLAINT

(Declaratory Judgment Action—Review of Order of Deportation)

Plaintiffs, by their attorneys, respectfully allege:

COUNT I

1. This is an action for declaratory judgment under the Declaratory Judgment Act (28 U.S.C. 2201) and for review

under the Administrative Procedure Act (5 U.S.C. 1001, et seq.).

2. Defendant is the Attorney General of the United States and is charged with the statutory duty to determine, after appropriate hearings, whether aliens are to be deported from the United States, the places to which aliens shall be deported, and whether they may be granted stays of deportation.

3. Plaintiff, Cheng Fu Sheng, is a native and citizen of China who entered the United States on June 9, 1952, as a bona-fide non-immigrant to receive military training with the United States Air Force.

4. Plaintiff remained in the United States following the completion of his military training.

5. On or about December 2, 1953, defendant issued a warrant ordering plaintiff's deportation upon the ground that plaintiff had failed to maintain his non-immigrant status in the United States.

6. Defendant thereafter ordered plaintiff to be deported to Formosa.

7. Defendant has withheld the execution of the aforesaid warrant of deportation pending final determination of an application filed by the plaintiff for adjustment of his status to that of a permanent resident of the United States, pursuant to the provisions of Section 6 of the Refugee Relief Act [50 U.S.C. App. 1971(d)].

8. The said application was denied finally on or about September 15, 1959.

9. The warrant which orders plaintiff's deportation to Formosa is void and contrary to law in that Formosa is not a "country" within the meaning of Section 243(a) of the Immigration and Nationality Act [8 U.S.C. 1253(a)] to which plaintiff may be deported.

10. Defendant has threatened to deport plaintiff, and unless restrained will effect plaintiff's deportation before the action herein can be heard.

COUNT II

11. Plaintiff re-alleges the allegations contained in Paragraphs 1 through 8.

12. Following the issuance of the warrant directing plaintiff's deportation to Formosa, plaintiff applied to the defendant to withhold such deportation, pursuant to the provisions of Section 243(h) of the Immigration and Nationality Act [8 U.S.C. 1253(h)], and established during the course of the administrative proceeding on said application that:

(a) At the time of his entry in the United States, plaintiff was an officer in the Chinese Nationalist Air Force;

(b) During the course of his military training in the United States, plaintiff publicly criticized the Chinese Nationalist Government as a dictatorship.

(c) Plaintiff's critical statements regarding the Chinese Nationalist Government were thereafter reported to his superior officers in Formosa.

(d) The former Governor of Formosa, Dr. K. C. Wu, who had served as Governor of Formosa from December 21, 1949, to April 16, 1953, has described in proceedings before the Immigration and Naturalization Service the political methods of the Chinese Nationalist Government in Formosa, namely that it is a "police state," which resorts to mass arrests of political opponents by secret police and inflicts brutal treatment upon such opponents without trial, and had established upon the basis of his personal knowledge that critics of the Chinese Nationalist Government would be subject to physical persecution.

13. No contrary evidence whatsoever was introduced during the administrative proceedings to rebut plaintiff's claim that he would be subject to physical persecution were he to be deported to Formosa.

14. Notwithstanding the aforesaid record, defendant's special inquiry officer found that the evidence did not support a finding that the plaintiff would be subject to physical persecution in Formosa.

15. Upon the sole basis of the finding and recommendation of the aforesaid special inquiry officer, defendant acting through his Regional Commissioner of the Immigration and

Naturalization Service for the Southwest Region, order that plaintiff's application for stay of deportation be denied.

16. The denial of plaintiff's application for withholding his deportation to Formosa is not supported by any evidence, substantial or otherwise.

17. The evidence submitted by plaintiff in support of his claim that he will be subject to physical persecution if deported to Formosa has established that plaintiff has a reasonable and substantial basis for fearing persecution by the Chinese Nationalist authorities in Formosa on account of his political opinions.

18. That defendant's denial of plaintiff's application for withholding of his deportation to Formosa is arbitrary, capricious, and contrary to law.

19. Defendant has threatened to deport plaintiff, and unless restrained will effect plaintiff's deportation before the action herein can be heard.

COUNT III

20. Plaintiff, Lin Fu Mei, re-alleges the allegations contained in Paragraph 1 through 10 in Count I, except to allege that he entered the United States on or about February 12, 1953, and that the warrant directing his deportation to Formosa was issued on or about April 26, 1956.

COUNT IV

21. Plaintiff, Lin Fu Mei, re-alleges the allegations contained in Paragraphs 11 through 19 in Count II.

WHEREFORE, plaintiffs pray for a judgment:

(a) Declaring that the warrant of deportation which directs plaintiffs to be deported to Formosa is contrary to law and is void;

(b) Declaring that the denial of plaintiffs' applications for withholding of their deportation to Formosa upon the ground that they would be subject to physical persecution, if so deported, is arbitrary, capricious, an abuse of the discretion reposed in the defendant, and are therefore void;

(c) Remanding the cause herein for a proper exercise of discretion by the defendant; and

(d) Restraining the defendant from deporting plaintiffs pending the outcome of this litigation; and

(e) For such other and further relief as may be appropriate.

[S] JACK WASSERMAN

[S] DAVID CARLINER,

Attorneys for Plaintiffs,

902 Warner Building, Washington 4, D.C.

WASSERMAN & CARLINER, FALLON AND HARGREAVES,

Of Counsel.

United States District Court for the District of Columbia

Civil Action No. 2580-59

CHENG FU SHENG AND LIN FU MEI, PLAINTIFFS

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED
STATES, DEFENDANT

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by counsel, move for summary judgment upon Counts I and III of the Complaint filed herein, it being stipulated by the parties that as to these counts there is no genuine issue of material fact.

[S] JACK WASSERMAN,

[S] DAVID CARLINER,

Attorneys for Plaintiffs,

902 Warner Building, Washington 4, D.C.

Stipulation agreed to and notice of motion waived:

Assistant United States Attorney,

Attorney for the Defendant.

United States District Court for the District of Columbia

Civil Action No. 2580-59

CHENG FU SHENG AND LIN FU MEI, PLAINTIFFS

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED
STATES, DEFENDANT

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Comes now the defendant by his attorney, the United States Attorney for the District of Columbia, and respectfully moves the Court to grant summary judgment in his favor on the ground that the certified records of the Immigration and Naturalization Service concerning plaintiffs, and the certified copy of a letter of Ely Maurer, State Department, attached hereto and made a part hereof, show that there is no genuine issue of material fact herein and that defendant is entitled to judgment as a matter of law.

[S] Oliver Gasch,
OLIVER GASCH,
United States Attorney,

[S] Edward P. Troxell,
EDWARD P. TROXELL,
Principal Assistant United States Attorney,

[S] John F. Doyle,
JOHN F. DOYLE,
Assistant United States Attorney,

[S] Ellen Lee Park,
ELLEN LEE PARK,
Assistant United States Attorney.

United States District Court for the District of Columbia

Civil Action No. 2580-59

CHENG FU SHENG AND LIN FU MEI, PLAINTIFFS

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED
STATES, DEFENDANT

STIPULATION

It is hereby stipulated and agreed by and between counsel for the parties hereto that:

(1) the subpoena issued to L. Paul Winings is hereby withdrawn;

(2) if L. Paul Winings were called as a witness he would testify that Interim Decision 212 of November 7, 1950, House Report 91, 82d Congress, 1st Session (1951) has not to his knowledge been overruled by administrative decisions of the Immigration Service insofar as the Displaced Persons Act of 1948 is concerned;

(3) it is the purpose of defendant to effect the deportation of plaintiffs to Formosa and this fact has been communicated to them;

(4) the Government of the Republic of China has agreed to accept plaintiffs into its territory;

(5) the subpoena issued to Ely Maurer is withdrawn;

(6) In Article 2 of the Japanese Peace Treaty, which entered into force April 28, 1952, Japan renounced all "right, title and claim" to Formosa. Neither this agreement nor any other agreement thereafter has purported to transfer the sovereignty of Formosa to China.

[S] Ellen Lee Park,

ELLEN LEE PARK,

Assistant United States Attorney,

Attorney for Defendant.

DAVID CARLINER,

Attorney for Plaintiffs.

Dated:.....

United States District Court for the District of Columbia

Civil Action No. 2580-59

CHENG FU SHENG, ET AL., PLAINTIFFS

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED
STATES, DEFENDANT

ORDER

This case having come before the Court on cross motions for summary judgment, and it appearing that there are no material issues of fact involved herein and that plaintiffs are entitled to judgment as a matter of law, it is by the Court, this 13th day of October, 1959.

Ordered, That plaintiffs' motion for summary judgment be and it hereby is granted; and it is

Further Ordered, That defendant's motion for summary judgment be and it hereby is denied.

[S] Holtzoff, J.,
Judge.

Certificate of Service

I hereby certify that service of the foregoing proposed Order submitted by defendant as an alternative to that submitted by plaintiffs has been made upon plaintiffs by mailing a copy thereof to their attorney, David Carliner, Esq., Wasserman and Carliner, Warner Bldg., Washington, D.C., this 12th day of October, 1959.

[S] Ellen Lee Park,
ELLEN LEE PARK,
Assistant United States Attorney.

United States District Court for the District of Columbia

Civil Action No. 2580-59

CHENG FU SHENG AND LIN FU MEI, PLAINTIFFS

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE
UNITED STATES, DEFENDANT

OPINION

Jack Wasserman and David Carliner, both of Washington, D.C., for the plaintiffs.

Oliver Gasch, United States Attorney; and Ellen Lee Park, Assistant United States Attorney, of Washington, D.C., for the defendant.

The principal question presented for decision in this case is whether an alien who is deportable to China may be deported to Formosa. This is an action against the Attorney General for a declaratory judgment, which would adjudicate that the plaintiffs, who are natives and citizens of China and whose deportation has been ordered, may not be deported to Formosa. The matter comes before this Court on cross-motions for summary judgment. There are no material issues of fact and only questions of law are involved.

The plaintiffs are natives and citizens of China, who entered the United States in 1952 to receive military training with the United States Air Force. They completed their studies but failed to depart from this country. Deportation proceedings were thereupon brought against them by the Immigration and Naturalization Service of the Department of Justice, and eventuated in warrants directing the deportation of the plaintiffs "pursuant to law". It has been stipulated that the Government intends to execute the warrants by deporting them to Formosa, in view of the fact that deportation to the mainland of China is impossible due to its occupation by the Communist regime. The plaintiffs thereupon instituted this action against the Attorney General for a declaratory judgment adjudicating that their deportation to Formosa would be contrary to law.

The places to which an alien may be deported are expressly and specifically defined by statute. The provisions now in ef-

fect are contained in the Act of June 27, 1952, and are found in Section 1253 of Title 8 of the U.S. Code. This enactment enumerates eight possibilities as places of deportation. Each possibility, however, is expressly stated to be a *country*. Among them is the country from which the alien last entered the United States; the country in which is located the foreign port at which he embarked for the United States; the country in which he was born; the country in which his place of birth is situated when deportation is ordered; any country in which he resided prior to entering the country from which he entered the United States; or the country which had sovereignty over his birthplace at the time of his birth. It should be emphasized, however, that in each instance the place to which deportation may be ordered is a *country* and not a particular location. In this respect the 1952 statute is radically different from the earlier law, which permitted deportation to be had to a particular port, such as the foreign port at which the alien embarked for the United States. Thus, Section 20 of the Act of February 5, 1917,¹ expressly provided that the deportation of aliens "be to the country whence they came or to the *foreign port*² at which such aliens embarked for the United States; . . ." Were this provision in existence in the present statute, there would be no doubt whatever that the deportation of the plaintiffs to Formosa would be valid. For some reason which does not seem to appear in the legislative history, this provision was not included in the 1952 Act, and thereby was repealed by implication. No doubt the Congress must have had some good reason for abrogating the power of the Government to deport an alien to a specified port and requiring deportation only to a designated country.

Since the plaintiffs are natives and citizens of China, their deportation may properly be effected to China. The question then arises whether Formosa is part of China. If it is, they may lawfully be deported to Formosa.

It is fundamental that such questions as whether a foreign country or a foreign government should be formally recognized; whether a particular nation has sovereignty over a specified

¹ 39 Stat. 874, 890.

² Italics supplied.

area; and what are the boundaries of a foreign country, are problems that are not to be solved by the courts, but are political matters that are to be decided by the executive and legislative departments of the Government. On such topics the President and the Secretary of State speak for the United States, and the courts are obligated to follow their pronouncements.

Thus, in the leading case of *Jones v. United States*, 137 U.S. 202, 212, Mr. Justice Gray wrote as follows:

"Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances."

The following authorities among the legion that might be cited are to the same effect:

Foster v. Neilson, 2 Pet. 253, 307, 309.

Williams v. Suffolk Ins. Co., 13 Pet. 415, 420.

Oetjen v. Central Leather Co., 246 U.S. 297, 302.

National Union Fire Ins. Co. v. Republic of China, 254 F.2d 177.

Latvian State Cargo & Passenger SS Line v. Clark, 80 F. Supp. 683.

Oppenheim, International Law, 7th Ed. Sec. 357a.

I Hackworth, Digest of International Law, 165.

It is necessary, therefore, to ascertain and be guided by the attitude of the Department of State on the question whether Formosa is to be regarded as a part of China.

The attitude of the State Department is stated in a formal communication from Ely Maurer, Assistant Legal Adviser for Far Eastern Affairs of the Department of State, dated June 2, 1959, and addressed to Mr. Robert J. Asman, an Assistant United States Attorney. This statement was submitted by Government counsel as representing the views of the political

department of the Government on this subject. Pertinent portions of this statement read as follows:

"In response to your telephone inquiry of this date, you are informed that the United States recognizes the Government of the Republic of China as the legal Government of China. The provisional capital of the Republic of China has been at Taipei, Taiwan (Formosa), since December 1949.

"In 1895, under terms of the Treaty of Shimonoseki, China was compelled to cede Formosa to Japan. In the Cairo Conference, the United States, United Kingdom and China declared it was their 'purpose' that Manchuria, Formosa and the Pescadores 'shall be restored to the Republic of China.' Thereafter in August 1945 in the Potsdam Conference of the United States, United Kingdom and China declared 'that the terms of the Cairo Declaration shall be carried out.' This Potsdam Declaration was subsequently adhered to by the U.S.S.R. On September 2, 1945 the Japanese Government, in the instrument of surrender, accepted the provisions of the Declaration. The Supreme Allied Commander for the Allied Powers then issued Directive No. 1 under which the Japanese Imperial Headquarters issued General Order No. 1 requiring Japanese commanders in Formosa to surrender to Generalissimo Chiang Kai-shek of the Republic of China. Since September 1945 the United States and the other Allied Powers have accepted the exercise of Chinese authority over the island. In Article 2 of the Japanese Peace Treaty, which entered into force April 28, 1952, Japan renounced all 'right, title and claim' to Formosa."

A Department of State Bulletin, Vol. XXXIX, No. 1017, dated December 22, 1958, which constitutes an official expression of the foreign policy of the United States, contains the following discussion of the problem in which we are interested (pp. 1005 and 1009):

"Since the middle of the 17th century and up to 1895 Formosa was a part of the Chinese Empire. In 1895

under the Treaty of Shimonoseki China ceded Formosa to Japan. In the Cairo conference in November 1943 the United States, United Kingdom, and China declared it was their 'purpose' that Manchuria, Formosa, and the Pescadores 'shall be restored to the Republic of China'. Thereafter in August 1945 in the Potsdam conference the United States, United Kingdom, and China declared that 'the terms of the Cairo Declaration shall be carried out.' This Potsdam declaration was subsequently adhered to by the U.S.S.R. On September 2, 1945, the Japanese Government, in the instrument of surrender, accepted the provisions of the declaration. The Supreme Allied Commander for the Allied Powers then issued Directive No. 1 under which the Japanese Imperial Headquarters issued General Order No. 1 requiring Japanese commanders in Formosa to surrender to Generalissimo Chiang Kai-shek of the Republic of China. Since September 1945 the United States and the other Allied Powers have accepted the exercise of Chinese authority over the island. In article 2 of the Japanese Peace Treaty, which entered into force April 28, 1952, Japan renounced all 'right, title and claim' to Formosa. *Neither this agreement nor any other agreement thereafter has purported to transfer the sovereignty of Formosa to China.*" (Emphasis supplied.)

* * * * *

"In giving the historical background of Formosa it has been pointed out that at Cairo the Allies stated it was their purpose to restore Formosa to Chinese sovereignty and at the end of the war the Republic of China received the surrender of Japanese forces on Formosa. It has also been pointed out that under the Japanese Peace Treaty, Japan renounced all right, title, and claim to Formosa. However, *neither in that treaty nor in any other treaty has there been any definitive cession to China of Formosa. The situation is, then, one where the Allied Powers still have to come to some*

agreement or treaty with respect to the status of Formosa." (Emphasis supplied.)

From the foregoing official pronouncements of the Department of State, it appears that the United States recognizes the Government of the Republic of China as the legal government of China; that the provisional capital of the Republic of China has been at Taipei, Taiwan (Formosa) since December 1949; that the Government of the Republic of China exercises authority over the island; that the sovereignty of Formosa has not been transferred to China; and that Formosa is not a part of China as a country, at least not as yet, and not until and unless appropriate treaties are hereafter entered into. Formosa may be said to be a territory or an area occupied and administered by the Government of the Republic of China, but is not officially recognized as being a part of the Republic of China. Expressions of the State Department are drawn with care and circumspection to refrain from such recognition.

Whether such a territory may be regarded as a part of a country as that term is used in the Immigration laws, does not appear to have been decided. The existence of the question was noted by Mr. Justice Brandeis in *United States ex rel Mensevich v. Tod*, 264 U.S. 134, 137, but expressly left open.

The conclusion seems inescapable to this Court that since under existing law, deportation may be effected only to a specific country, in this instance China, and since Formosa is not regarded by the Department of State as part of China as a country, the plaintiffs may not be deported to Formosa. Manifestly, as has been shown heretofore in this matter the Court must be bound by the official attitude of the Department of State, which apparently has been studied very carefully and expressed in guarded phraseology. It is even conceivable that for the Court then to regard Formosa as part of China for any purpose and thus go beyond the expressions of the Department of State, might cause embarrassment or complications insofar as that Department is concerned.

It is urged by Government counsel that the word "country" should be given a broad meaning. Manifestly, a statute should not be construed literally, but should receive a reasonable and

sensible interpretation. On the other hand, the Courts should resist any temptation to read into a statute something that is not there, or place a tortured construction on an enactment with a view to effectuating what the Court may think the Congress would have done had the matter been called to its attention. To do so would be an encroachment on the legislative power. It is peculiarly so in this instance because in the 1952 revision, the Congress dropped the provision contained in the 1917 Act, which permitted deportation to a specific foreign port. It would seem that to adopt the construction urged by the Government would in effect reinsert that phrase back in the statute—something that the Congress has not done so far and that the Court may not do.

The decision of the Fourth Circuit in *Delany v. Moraitis*, 136 F. 2d 129, on which Government counsel, in part, rely, does not seem to help their position. That case held that a citizen of Greece, whose deportation had been ordered but who could not be deported to Greece because Greece had been overrun by Germany during the War, could be delivered into the custody of the Greek Government in exile in England. It must be observed that Judge Parker in his opinion based his decision very largely on war conditions then prevailing. The Congress later, in the 1952 revision, expressly limited the effect of the decision in the *Delany* case to deportation in time of war, 8 U.S.C. § 1253(b)(1). Consequently, the conclusion of the *Delany* case must be regarded as law only in time of war.

The Court is not unmindful of the fact that its conclusion leads to a temporary impasse and makes it impossible for the time being to effect the deportation of the plaintiffs, and possibly other citizens of China. This matter can, however, be easily solved, for the Congress can readily and promptly amend the statute and make the amendment retroactive, if it feels that deportation should be effected. This course need not involve undue delay. The Congress could possibly amend the statute by reinserting into the above-mentioned provision from the 1917 Act, or by providing that deportation may be effected to any territory or area provisionally occupied by the Government of the country to which deportation must be effected, or

in some other manner that would accomplish the same objective. Legislative action would be the orderly course. For the Court to construe the present Act as meaning something that it does not purport to mean, would be an invasion of legislative power.

Motion of defendant for summary judgment is denied.

Motion of plaintiffs for summary judgment is granted.

[S] ALEXANDER HOLTZOFF,
United States District Judge.

OCTOBER 6, 1959.

United States District Court for the District of Columbia

Civil Action No. 2927-59

PETER YING AND WONG CHAI LIANG, PLAINTIFFS

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED
STATES, DEFENDANT

OPINION

Jack Wasserman and David Carliner, both of Washington, D.C., for plaintiffs.

Oliver Gasch, United States Attorney, Edward P. Troxell, Principal Assistant United States Attorney, John F. Doyle, Assistant United States Attorney, and Robert J. Asman, Assistant United States Attorney, for defendant.

This is an action against the Attorney General for a declaratory judgment. The two plaintiffs are nationals and citizens of China who entered the United States as nonimmigrant crewmen, overstayed their authorized time, and were ordered deported. The findings of deportability are not challenged. The defendant has moved for summary judgment and plaintiffs also have so moved.

The warrants of deportation direct that plaintiffs be deported "pursuant to law" but plaintiffs contend that the warrants are void because they do not specify the country to which plaintiffs are to be deported. It is conceded that each plaintiff received formal notice that the "country to which his deportation has been directed" is "Hong Kong." However, plaintiffs assert that Hong Kong is not a country within the meaning of the Immigration and Nationality Act. These questions of law are the only issues involved.

The Act of June 27, 1952, 8 U.S.C.A. 1253, governs as to the countries to which aliens may be deported. Among these is the "country from which such alien last entered the United States."

The Act does not define the word "country". At the time plaintiffs entered the United States they came from Hong Kong, a British Crown Colony, where they had resided for years. The British Consulate General in San Francisco has advised that consent has been granted by the authorities in Hong Kong for the acceptance of plaintiffs as deportees.

In support of their claim that Hong Kong is not a country within the meaning of the Immigration and Nationality Act plaintiffs cite *Cheng Fu Sheng v. Rogers*, 177 F. Supp. 281, D.C.D.C. The plaintiffs in that case were natives and citizens of China, and in 1952 had entered the United States from Formosa for the purpose of receiving military training with the United States Air Force. They finished their studies but failed to leave. The question was whether they might be deported to Formosa, the government there being willing to receive them. The court pointed out that China ceded Formosa to Japan in 1895, that in the Japanese Peace Treaty effective 1952 Japan renounced all right, title and claim to Formosa, but that neither in that treaty nor in any other has there been any cession to China of Formosa although the United States recognizes the Government of the Republic of China (the Nationalist Government) as the legal government of China and that such government exercises authority over Formosa. Then the court concluded

"* * * that since under existing law, deportation may be effected only to a specific country, in this instance China, and since Formosa is not regarded by the Department of State as part of China as a country, the plaintiffs may not be deported to Formosa."

This Court does not regard the ruling in *Sheng* as persuasive.

It is well settled that statutes should be construed, if possible, so as to effectuate the purpose intended and to avoid absurd consequences. *Delany v. Moraitis*, 4 Cir., 136 F. 2d 129, 131. Where language is susceptible of a construction which preserves the usefulness of a statute, the judicial duty rests upon the court to give expression to the intendment of the law. *Armstrong Co. v. Nu-Enamel Corp.*, 305 U.S. 315, 333. *United States v. American Trucking Association*, 310 U.S. 534, 543.

In the instant case the Government proposes to deport from this country the two alien plaintiffs who are here contrary to our laws and to place them where they were immediately preceding the time they entered the United States, that is, in Hong Kong. This proposal may be carried out if Hong Kong is a "country" under that provision of the Act declaring that deportation of an alien may be made to the "country from which such alien last entered the United States."

A definition of the word "country" was given by the Supreme Court in *Burnet v. Chicago Portrait Co.*, 285 U.S. 1 (1932), as follows:

"The word 'country,' in the expression 'foreign country,' is ambiguous. It may be taken to mean foreign territory or a foreign government. In the sense of territory, it may embrace all the territory subject to a foreign sovereign power. When referring more particularly to a foreign government, it may describe a foreign State in the international sense, that is, one that has the status of an international person with the rights and responsibilities under international law of a member of the family of nations; or it may mean a foreign government which has authority over a particular area or subject-matter, although not an international person but only a component part, or a political subdivision, of the larger international unit. The term 'foreign country' is not a technical or artificial one, and the sense in which it is used in a statute must be determined by reference to the purpose of the particular legislation."

The *Burnet* case concerned the claim of a corporation to an income tax deduction under a law allowing as such deduction part of income taxes paid "to any foreign country." The question involved was whether New South Wales constituted a "foreign country" within the meaning of the applicable law. It was held that New South Wales did so constitute a foreign country. New South Wales then was and is a state of the Commonwealth of Australia. The rationale of the court in *Burnet* as to the meaning of the word "country" has significance here. The adoption of that rationale in the instant case would

meet the requirement that the sense in which language is used in a statute must be determined by reference to the purpose of the particular legislation. Moreover, such adoption would tend to achieve and not to defeat the aims of the 1952 Immigration and Nationality Act.

It is the view of this court that Hong Kong is a country within the meaning of the Immigration and Nationality Act of 1952 and that plaintiffs may be deported to Hong Kong.

The plaintiffs are not prejudiced by the fact that the warrants of deportation do not specify the place to which they are to be deported as it is clear to plaintiffs and the appropriate authorities that plaintiffs are to be deported to Hong Kong.

The motion of the defendant for summary judgment will be granted and the motion of plaintiffs for summary judgment will be denied.

BURNITA SHELTON MATTHEWS, *Judge*.

FEBRUARY 10, 1960.

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,487

WILLIAM P. ROGERS,
Attorney General of the United States,

Appellant,

v.

CHENG FU SHENG AND LIN FU MEI,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

*United States Court of Appeals
For the
District of Columbia Circuit*

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QUESTIONS PRESENTED

1. Whether a warrant of deportation may be executed to deport an alien to "Formosa" where the statute [8 U.S.C. 1253(a)] expressly provides that deportation be effected to a "country".
2. Whether the judiciary may determine that Formosa is part of the territory of the Republic of China, and, therefore, within that country for the purpose of the deportation provisions of the Immigration and Nationality Act, in the face of a determination of the Executive that sovereignty over Formosa has never been transferred to China.
3. Whether Formosa may be regarded as a country for purposes of the deportation provisions of the Immigration and Nationality Act.
4. Whether appellees may be deported to a place other than a country.

(iii)

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 15,487

WILLIAM P. ROGERS,
Attorney General of the United States,

Appellant,

v.

CHENG FU SHENG AND LIN FU MEI,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

The appellees are natives and citizens of China, who entered the United States in 1952 to receive military training with the United States Air Force. They completed their studies but failed to depart from this country. Deportation proceedings were thereupon brought against them by the Immigration and Naturalization Service of the Department of Justice, and eventuated in warrants directing the deportation of the plaintiffs "pursuant to law". It has been stipulated that the Government intends to execute the warrants by deporting them to Formosa. The appellees

thereupon instituted the action below against the Attorney General for a declaratory judgment adjudicating that their deportation to Formosa would be contrary to law. (J.A. 21-24) Appellees contended that they could not be deported to Formosa for the reason that Formosa is not a "country" to which they may be deported within the meaning of the term "country" used in Section 243(a) of the Immigration and Nationality Act, 66 Stat. 212, 8 U.S.C. §1253(a) (1952) (J.A. 21-23). Cross motions for summary judgment were filed (J.A. 24, 25), and the parties stipulated further that in the 1952 Japanese Peace Treaty, Japan renounced all interest in Formosa, and that no subsequent agreement thereafter entered into purported to transfer the sovereignty of Formosa to China (J.A. 26).

The District Court granted summary judgment for appellees.

The Court held that:

"The places to which an alien may be deported are expressly and specifically defined by statute . . . (and that) . . . in each instance the place to which deportation may be ordered is a country and not a particular location . . . " (J.A. 28-29).

The Court stated further, however, that inasmuch as the appellees are natives and citizens of China, "they may lawfully be deported to Formosa" if "Formosa is a part of China".

As to this issue, the Court, after reviewing communications and material from the Department of State, ruled that:

"Since Formosa is not regarded by the Department of State as part of China as a country" the plaintiffs (appellees) may not be deported to Formosa". (J.A. 33).

The question whether a particular nation has sovereignty over a specified area, the Court declared, is a political matter, as to which the Court is "bound by the official attitude of the Department of State" (J.A. 29, 30, 33).

An order was entered on October 13, 1959, granting appellees' motion for summary judgment. This appeal was noted by appellant on November 16, 1959.

SUMMARY OF ARGUMENT

The Immigration and Nationality Act provides in the section relevant here (8 U.S.C. 1253(a)) for the deportation of an alien to any "country of which such alien is a subject (,) national, or citizen" Two questions are in issue: Whether the term country in that Act encompasses Formosa in view of the history, geography and present status of that island, and (2) If Formosa is not a country, whether that term as used in the statute means a geographical area that is not a country.

Appellees submit that Formosa cannot be held by the Courts to be a country. The State Department, whose determinations in these matters are conclusive (Jones v. United States 137 U.S. 202, 212) has declared that although China ceded Formosa to Japan in 1895 under the Treaty of Shimonoseki, Japan, in Article 2 of the Japanese Peace Treaty of April 28, 1952, merely renounced all 'right, title and claim' to Formosa. "Neither this agreement nor any other agreement thereafter," the State Department has stated, "has purported to transfer the sovereignty of Formosa to China." 39 State Department Bulletin No. 1017, pp. 1005, 1009.

Sovereignty, as the appellant concedes, (p. 13) is the touchstone of all international law. It is therefore the touchstone for determining whether Formosa may be regarded as part of the territory, i.e., country, of China. Clearly, it is not.

Appellant seeks to escape his impalement by the State Department's carefully formulated position by urging a construction of the term country broad enough to include an island which has never had an independent

existence, which even now is no more than a de facto political and territorial subdivision of a foreign country, and which is being occupied and administered by the government of that foreign country without cession of sovereignty over it. An examination of the present and the prior statutes, apart from the question whether a court may substitute its judgment for that of the State Department, demonstrates that this escape is not available to appellant. The very section which contains the statutory language involved here shows that Congress has employed a variety of terms to denominate geographical and political areas: "foreign contiguous territory", "islands adjacent to the United States" (8 U.S.C. 1253(a)), "political or territorial subdivision of a foreign country" (8 U.S.C. 1253(b)(2)), and "port of deportation" (8 U.S.C. 1253(c)). In addition, the statute employs a storehouse of other words and phrases in other sections. The use by the Congress of specific words to say what it means precludes a usage of the term country to supply a meaning available from other statutory words. (United States v. Atchison T. & S.F.R. Co., 220 U.S. 37).

Moreover, the prior statute, (8 U.S.C. 156) permitted the deportation of aliens to the foreign port from which they embarked to the United States, in addition to the "country whence they came." As the court below declared "to adopt the construction urged by the Government would in effect reinsert that phrase (foreign port) back in the statute — something that the Congress has not done so far and that the Court may not do". (J.A. 34).

The position of the Court below is underscored by the fact that Congress has chosen in express words to permit deportations to political and territorial subdivisions, which Formosa could be at most, but has limited such deportations to a time of war. (8 U.S.C. 1253(b))

In any event, the rule of statutory construction applicable to deportation laws requires the "narrowest of several possible meanings". Fong Haw Tan v. Phelan, 333 U.S. 6, 10.

ARGUMENT

I

FORMOSA IS NOT A COUNTRY WITHIN THE MEANING OF SECTION 243(a) OF THE IMMIGRATION AND NATIONALITY ACT. (8 U.S.C. 1253(a))

To say, as appellant does, that Formosa is a country within the meaning of the Immigration and Nationality Act is to ignore geography, history, international law, as well as the comparative provisions in the Act itself.

Formosa is an island in the South China Sea which has never, at least in modern history, had an independent existence as a country. It became a part of the Chinese Empire in 1682 (Encyclopaedia Britannica, 11th edition, vol. 10, pp. 670, 671), and remained a possession of China until 1895, when, by the Treaty of Shimonoseki, it was ceded to Japan. Since the end of hostilities at the close of World War II in September 1945, the island has been occupied by the Republic of China. Thereafter, Japan renounced all 'right, title, and claim' to Formosa by its adherence to the Japanese Peace Treaty which became effective April 28, 1952. However, neither this agreement nor any other agreement thereafter, the State Department has stated, has purported to transfer the sovereignty of Formosa to China. 39 Department of State Bulletin No. 1017, December 22, 1958, at pp. 1005 and 1009. As the Court below indicated (J.A. 33),

"... the official attitude of the Department of State ... apparently has been studied very carefully and expressed in guarded phraseology. It is even conceivable that for the court then to regard Formosa as part of China for any purpose and thus go beyond the expressions of the Department of State might cause embarrassment or complications insofar as that Department is concerned."

A. The Determinations Of The Executive As To Boundaries And The Sovereignty Of Foreign Countries Are Political Matters Which Are Binding Upon The Courts.

In effect, appellant seeks a redetermination by this Court of the State Department's policy. Appellees believe that this avenue of inquiry is not open to the Court. The reasons which have impelled the judiciary not to review decisions of the Executive relating to foreign policy require the Court to reject any attempt to go behind the determination of the State Department that Formosa has not been ceded, or its sovereignty transferred, to China. If the Court is permitted to decide that the occupation and the administration of an area by a government makes that area the "territory of the country of that government", then the court would be exercising a function of foreign policy, "which has long been held not subject to judicial intrusion or inquiry". Chicago and Southern Airlines, Inc. v. Waterman Steamship Corp. 333 U.S. 103, 111; Jones v. United States, 137 U.S. 202, 213.

There is no analogy here, as appellant suggests (at p. 13) with the status of the Federal Republic of Germany. The question is not whether a "final peace treaty" has been written, but rather what the existing treaties and international agreements provide. What is analogous is the question whether the judiciary could determine, in conflict with the position of the State Department, the status of various territorial transfers affecting the Federal Republic of Germany.

If this Court were empowered to enquire whether Formosa is occupied and administered by the Republic of China, and upon an appropriate finding, to rule that Formosa is the territory of the Republic of China, then the same principle could apply to the less palatable question whether Danzig and what was East Prussia, occupied and administered by Poland, are now the sovereign territory of Poland, and whether what were the Eastern Provinces of Poland, now occupied and administered by the Soviet Union, are Soviet territory. It seems scarcely necessary

to suggest that a ruling by this Court that these areas are territories of Poland and of the Soviet Union would be an encroachment upon the powers of the Executive and would indeed embarrass our international policy. The determination of the Executive that Formosa has not been ceded and that its sovereignty has not been transferred to China, appellees believe, forecloses all further inquiry upon the subject.

**B. The Republic Of China Has Not Acquired Sovereignty Over Formosa;
Hence Formosa Is Not Part Of The Territory Of That Country.**

Appellant, nonetheless, urges that this Court determine that Formosa is a "country". He argues (at pp. 10-11) that the United States recognizes the "Government on Formosa" as the legitimate government of China, that it is the political power to which the appellees owe allegiance, that it "has de facto sovereignty or control over the island of Formosa", and (at p. 13) that the "government of Formosa" (sic) is sovereign over its territory. Most of these arguments, appellees believe, must be discarded by the appellant for, he concedes, that sovereignty is the determinative issue. Quoting Morris, Dicey's Conflict of Laws, (7th ed. (1958) he states (at p. 13) that "'Country means the whole of a territory subject under one sovereignty to one body of law' and that . . . sovereignty is the touchstone of all international law".

Corollary to this argument, appellant says (at p. 13) that it is "indisputable that the government of Formosa is sovereign over its territory". (Emphasis supplied). Appellant presumably means the Republic of China, there being no suggestion of another government. His statement is not supported either by the position of the State Department set forth in 39 Department of State Bulletin No. 1017, pp. 1005, 1009 (quoted at J.A. 31-32), or by other authorities.

All that can be said is that the United States has recognized that "The Republic of China effectively controls" Formosa (Letter of former Secretary of State, John Foster Dulles, to Minister of Foreign Affairs of Republic of China, George K. C. Yeh, dated December 10, 1954, Documents on American Foreign Relations, 1954, Council on Foreign Relations) and that it has agreed to defend that territory against aggression without its conduct being "construed as affecting or modifying the legal status of sovereignty of" Formosa. See Article 2, Chapter II, Japanese Peace Treaty, April 28, 1952; Treaties and Other International Acts Series 2490; Articles II, V and VI, Mutual Defense Treaty between the United States and the Republic of China; Senate Executive Report No. 2, 84th Cong., 1st Sess., February 8, 1955.

This, of course, is not sufficient to give the Republic of China sovereignty over Formosa. See Moore's Digest of International Law, Vol. 1, p. 290, 1906 ed., citing American Insurance Co. v. Canter (356 Bales of Cotton) 1 Pet (26 U.S.) 511, 542, as follows:

"The holding of a conquered territory is regarded as a mere military occupation until its fates shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose."

See also, International Law, Charles C. Hyde, Vol. 1, pp. 173-176 and Oppenheim's International Law, edited by Lauterpracht, 8th ed. Vol. 1, at page 545:

"Nowadays, however, the acquisition of territory by a state can mean nothing else than the acquisition of sovereignty over such territory."

Burnet v. Chicago Portrait Co., 285 U.S. 1, 5, upon which appellant relies (at p. 11) is not to the contrary. The Supreme Court there stated that the term country may be taken:

"to mean foreign territory or a foreign government. In the sense of territory, it may embrace all the territory subject to a foreign sovereign power."

If the concept of the word 'country' is to be territorial, therefore, the determinative issue is whether a country has sovereignty over the territory in question. For the reasons we have given, appellees believe that the island of Formosa cannot be regarded as territorially subject to the sovereignty of the Republic of China.

Appellant has avoided an express reliance upon the governmental concept of the term "country", and properly so. His argument, nevertheless, embraces certain aspects of the governmental approach, viz., the political allegiance of the appellees and the de facto control by the Republic of China over Formosa (pp. 10-11).

The governmental usage of the term 'country' has no applicability here. Even were the Taiwan Provincial Government, the political body which governs the island of Formosa (See The Statesman's Year Book (1959), p. 886, 897) to be regarded for certain purposes and in particular statutes as a foreign government within the meaning of the word 'country', the government involved here is the "Republic of China". It is that government, the appellant stipulated below (J.A. 26) which "agreed to accept plaintiffs (appellees)".

Moreover, the statute implies the territorial, rather than the governmental concept because throughout 8 U.S.C. 1253 (a) and (b) it requires the country be "willing to accept (a deported alien) into its territory", and if, during war and a "recognized government is in exile", that the "country in which is located that government in exile" must permit the alien "to enter its territory". (Emphasis supplied).

Upon the basis of history, geography, and international law, therefore, appellees believe that the Court below is correct in ruling that Formosa is not the territory of the Republic of China.

C. The Legislative Background Of The Statute And The Language Of The 1952 Act Indicate That The Term "Country" Does Not Include The Island Of Formosa.

An examination of the legislative history and of the language used by Congress in the present Immigration and Nationality Act demonstrates the error of the appellant's contention that the term "country" should be read so broadly that it encompasses an island, which has never had an independent existence and which is occupied by a foreign power. The words of the statute, and of the prior immigration laws, establish that the Congress has chosen precise terms to distinguish between "countries" and other geographical and political entities.

Under the 1917 Immigration Act (8 U.S.C. 156) prior to amendment by the Internal Security Act of 1950, deportation of aliens was authorized to:

"the country whence they came or to the foreign port at which such aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which they embarked for such territory." (Emphasis supplied)

Under this section, there is no requirement that appellees be deported to a country. Appellees could therefore have been deported under its provisions to the foreign port from which they embarked for the United States, regardless of its political or geographical status. Triant v. Nicolls, 50 F. Supp. 915 (D.C. Mass., 1943). Presumably, this would be Taipei, Formosa. The only other circumstance under which Formosa could be a proper place of deportation, as we note below, is if the United States were at war.

Under the Internal Security Act (64 Stat. 1010, 8 U.S.C. 156) and under the 1952 Immigration and Nationality Act (8 U.S.C. 1253), deportation may no longer be effectuated to the port of an alien's embarkation. Under the 1952 Act, except when the United States is at war, deportation must be effectuated to a designated country. (8 U.S.C. 1253(a)).

However, when the United States is at war, deportation may be effectuated to:

- (a) The country wherein the alien's government is in exile, or
- (b) If the alien's government is not in exile, to "a country or any political or territorial subdivision thereof which is proximate to the country of which the alien is a citizen or subject." (8 U.S.C. 1253(b)). (Emphasis supplied)

Throughout the 1952 Immigration and Nationality Act various terms are used to designate foreign shores.

In 8 U.S.C. 1253 itself differentiating words are employed. The term country is used more than twenty times, but, in addition, Congress denoted other political and geographical areas, by such terms as "foreign contiguous territory", "islands adjacent to the United States" (8 U.S.C. 1253(a)), "political or territorial subdivision: of a foreign country (8 U.S.C. 1253(b)(2)), and "port of deportation" (8 U.S.C. 1253(c)).

Elsewhere in the 1952 Act, these as well as various other denotative terms are used. The phrase "foreign contiguous territory" is used at 8 U.S.C. 1101(a)(6) in connection with the definition of "border crossing identification card" and at 8 U.S.C. 1182(a) (16), (17) and (24) to determine the excludability of aliens upon various grounds. See also 8 U.S.C. 1181 (c), 1221 (a) (c), 1228 (a) (b) (c) and (e), 1251 (a)(10), 1254 (a)(5), 1323 (a), 1326 (a)(2).

"Foreign port or place" is the term used in the definition of the word "entry". 8 U.S.C. 1101(a)(13). "Port outside thereof" (the United States appears at 8 U.S.C. 1285).

At 8 U.S.C. 1101(a)(14), the statute defines "foreign state" to include "outlying possessions of a foreign state, but self-governing dominions or territories under mandate or trusteeship shall be regarded as separate foreign states". The term "foreign state" is used at various

sections of the statute. See 8 U.S.C. 1101 (a) (15) (e); 1481 et seq. to 1487, 1499, 1500.

The phrase "foreign government recognized de jure by the United States" is used at 8 U.S.C. 1101 (a) (15) (g).

"Foreign country" is another term used recurrently in the Act. See 8 U.S.C. 1101 (a) (15) (f), (h); 1103(a); 1152(a) (3), 1201(c), 1221(a), 1228(d), 1351, 1353, 1406(a) (2) (3), 1451(d).

The specific term "independent country of Central or South America" is used at 8 U.S.C. 1101(a) (27) (c), in context with "Canada, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, and the Canal Zone". "Adjacent islands" are enumerated at 8 U.S.C. 1101(b) (5), and the expression recurs at 1182(a) (24), 1228(a) (b) (c) (e), 1251(a) (10), 1253(a), and 1254(a) (5).

For the purpose of determining the quota to which an immigrant is chargeable, the statute sets forth a series of political entities: (8 U.S.C. 1152(a)) "Each independent country, self-governing dominion, mandated territory, and territory under the international trusteeship of the United Nations . . ." (with various exceptions) are among the words used to denominate particular areas. "Inhabited lands" are attributable to a "quota area" specified by the Secretary of State. Ibid.

A geographical expression unique to the Immigration and Nationality Act, "Asia-Pacific triangle" is coined at 8 U.S.C. 1152(b). The words "colony or other component or dependent area of a governing country" appear at 8 U.S.C. 1152(c).

At 8 U.S.C. 1182(a) (28) (c), aliens are made excludable if they are members of the subversive parties of "any State of the United States, or of any foreign state, or of any political or geographical subdivision of any foreign state." This group of political entities is repeated again for purposes of deportation at 8 U.S.C. 1252(a) (6) (c) and for purposes of barring citizenship at 8 U.S.C. 1423(a) (2).

The all-inclusive term "any place outside of the United States" is used at 8 U.S.C. 1221(b), at 1281(a), at 1284(a), (b), 1287, 1323(a), and 1326(a) (2). The phrase "place where any such diseases are prevalent or epidemic" occurs at 8 U.S.C. 1222 along with the word "country".

At 8 U.S.C. 1323(b), the statute provides for certain penalties to be imposed upon transportation companies based upon the cost of travel from the "initial point of departure".

Naturalized citizens are required at 8 U.S.C. 1448 to renounce allegiance to any "foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen".

In setting forth various grounds upon which citizens may be expatriated the statute refers variously "to a foreign state" "a political subdivision thereof", "foreign territory" and "territory of a foreign state". 8 U.S.C. 1481, 1482, 1484, 1486, 1487.

The statute thus employs a virtual thesaurus of words to denote geographical and political areas.

What is significant here is that within the deportation section itself, 8 U.S.C. 1253, Congress has distinguished between foreign contiguous territories, adjacent islands, countries, and political and territorial subdivisions of countries.

Whatever Formosa may be, it can be no more than a political or territorial subdivision of a country. Appellant's power to deport to such an entity, however, arises solely from the provisions contained in 8 U.S.C. 1253(b). But this section comes into operation only when the United States is at war. Appellant, who concedes (at p.11) that the deportation here is based on 8 U.S.C. 1253(a) (6), seeks to interpret the word "country" in (a) so broadly that it would include a "political or territorial subdivision" which is mentioned only in (b).

It is a familiar rule, as Justice Holmes said in United States v. Atchison T. & S.F.R. Co., 220 U.S. 37 (1910):

"The presence of such a provision in the one part and its absence in the other is an argument against reading it as implied * * *. We see no reason to suppose that Congress meant more than it said."

The presence of the phrase "political or territorial subdivision" of a country in 8 U.S.C. 1253(b) and its absence from 8 U.S.C. 1253(a) should foreclose reading it by implication into the section from which it is absent. See also Tom We Shung v. Murff, 176 F. Supp. 253, 258 (S.D.N.Y. 1959).

Appellant has chosen three usages of the terms "country" or "foreign country", from among the many that appear in the statute, to suggest that if the construction of the word adopted by the court below is adopted, there will be "absurd" and incongruous results". (pp.13-14). It is axiomatic, of course, that the construction of words in a statute must be made in context and in the light of the legislative history. Other usages in the statute are therefore not dispositive of the question of construction here.

As to 8 U.S.C. 1253(a), the section under construction, as appellees have shown above, the legislative history indicates a change from the provisions of the 1917 Act, which would have permitted deportation to a geographical area smaller than a country, namely, to the port of embarkation. In the immediate context of the statutory language, Congress has employed various terms other than "country" to denote other geographical and political entities. In these circumstances there is no warrant for a court to rewrite a statute where the Congress has been so meticulous in its choice of words.

As the 9th Circuit said recently in an exclusion case, United States ex rel. Milanovic v. Murff, 253 F. 2d 941, 944 (1958), "That there may be . . . a statutory anomaly does not seem to us sufficient reason to ignore the plain distinction in the statute".

Nonetheless, it may be observed that most of appellant's examples do not bear analysis. He states that "if Formosa is not a 'country' then no alien from Formosa could be admitted to the United States under the provisions of this Act".

Appellant has overlooked the provisions of two sections of the statute. 8 U.S.C. 1152(d) applies generally:

"The provisions of an immigration quota for a quota area shall not constitute recognition by the United States of the political transfer of territory from one country to another, or recognition of a government not recognized by the United States."

Thus, regardless whether Formosa has been recognized as a part of the territory of the Republic of China, persons born on that island may be chargeable to the Chinese quota.

The second applies specifically to Chinese. 8 U.S.C. 1151(a) continues in effect Section 11 of the Immigration Act of 1924 (43 Stat. 153, 159). This establishes what is known as the Chinese racial, as distinguished from the geographical, quota, because under its provisions all Chinese aliens, regardless of place of birth, are chargeable to a special quota for "Chinese persons".

Whatever problems the construction of Section 1101(a)(15) (h), (8 U.S.C. 1101(a) (15) (h)) may pose, appellant is in error in assuming that a narrow construction of the term "country" in 8 U.S.C. 1253(a) will bar the admission to the United States of aliens from Formosa.

Similarly, the appellant suggests that the Attorney General could not establish Immigration Services offices in Formosa under 8 U.S.C. 1103(a). This function, however, is plainly in implementation of the admission of aliens to the United States, and the power to maintain such offices would carry no more significance than the allocation of visas.

The appellant also errs in stating (at p. 14) that "persons illegally attempting to enter the United States from Formosa . . . could not be excluded since Section 237(a) provides that such an alien 'shall be immediately deported to the country whence he came' ". The answer to this statement is the decision of the Supreme Court in Shaughnessy v. Mezei, 345 U.S. 206. Aliens may be, and have been excluded from the United States, if they are excludable for any reason, regardless of the ability of the United States to deport them.

As to the statement that "Formosans who have illegally entered the United States could not be deported" (p. 14), such aliens are not subject to the exclusion provisions of the statute, as appellant indicates (pp. 5-6). They may therefore, like the appellees, be deported to any one of the categories of countries set forth in 8 U.S.C. 1253(a), or in time of war, to those areas described in 8 U.S.C. 1253(b). It is incorrect, and certainly premature to say that the aliens from Formosa cannot be deported, absent a showing that no country will accept them. Cf. Rogers v. Alfred Dodge Lu, 104 App. D.C. 374, 262 F. 2d 471.

Finally, appellant attempts to derive support for his position from two decisions in other circuits. The decisions which appellant cites do not support him. United States ex rel Moon v. Shaughnessy, 218 F. 2d 316, he says is in conflict with the decision below because the Second Circuit necessarily regarded Formosa as a "country" (App. p. 8). The issue there, however, was not whether deportation could be effected to Formosa. It was whether the alien could be deported to Communist China. The ground raised was that because the United States did not maintain diplomatic relations with the government of that country, it could not communicate with it (sic). A country not recognized by the United States, it was argued, was not one within the terms of the Immigration and Nationality Act. The sole issue decided, therefore, was whether "if communication is impossible, the other nation is . . . to be regarded as a 'country' ". Cf. decision and appellee's brief (No. 14,556) in Rogers v. Lu, 104 U.S. App. D.C. 374, 262 F. 2d 471.

Although the Second Circuit allowed additional time to permit deportation to Formosa, (in an effort to avoid deportation, if possible, to Communist China) no issue as to that island was raised in the case.

The appellant also places heavy reliance upon Delany v. Moraitis, 136 F. 2d 129 (4 Cir., 1943). There the alien, a Greek national who was serving during World War II in the Greek Merchant Marine, was ordered deported to the Greek Government-in-Exile in England, inasmuch as Greece itself was occupied by German forces.

Several observations may be made about this decision. The first is, as the Court below noted (J.A. 34), that the Immigration and Nationality Act of 1952 expressly limited the effect of this decision, rendered during wartime in 1943, to deportation in time of war.

Thus, as stated above, 8 U.S.C. 1253(b) provides:

"If the United States is at war and the deportation, in accordance with the provisions of subsection (a), of any alien who is deportable under any law of the United States shall be found by the Attorney General to be impracticable, inadvisable, or impossible because of enemy occupation of the country from which the alien came or wherein is located the port at which he embarked for the United States or because of reasons connected with the war, such alien may, in the discretion of the Attorney General, be deported as follows:

(1) If such alien is a citizen or subject of a country whose recognized government is in exile, to the country in which is located that government in exile if that country will permit him to enter its territory; . . ."

The holding in the Moraitis case therefore can have no applicability to a peacetime deportation. Nor can it affect a deportation of a citizen of a country whose recognized government is not in exile. The Republic of China has not been said until now, at least, to be a "government in exile", despite the impression it has apparently made upon the Attorney General.

Moreover, an analysis of the factual situation in Moraitis indicates that it would not compel the deportation of the appellees to Formosa. For to deport the appellees to Formosa is not at all analogous to the deportation of the Greek national to the Greek Government-in-Exile in England. What the appellant proposes rather would be parallel in the Moraitis situation to the deportation of German nationals to Greece because the German government then occupied and exercised authority over that country.

Clearly, an act of this character affecting, as it does, the international relations of the United States, might, in the words of the Court below, "cause embarrassment or complications!" (J.A. 33) for the Executive.

To justify such a deportation, in the light of the history of the changes in the deportation provisions of the Immigration and Nationality Act, appellees believe that appellant requires more statutory authority than is reposed in him in 8 U.S.C. 1253(a).

II

DEPORTATION OF THE APPELLEES MUST BE TO A COUNTRY

Appellant's second ground in this Court is that appellees are deportable to Formosa regardless whether it is a country. Two arguments are urged in support of this position.

The first is that the clause (Clause 2 in 8 U.S.C. 1253 (a)) which permits deportation "to the country in which is located the foreign port at which such alien embarked for the United States . . ." permits deportation "not only to the specific foreign port" but also to the country in which it is located. (p.15).

Appellees note, parenthetically, that this is not the clause which appellant relied upon below to support deportation to Formosa. The stipulation, by its reference to the fact that the "Republic of China has agreed to accept plaintiffs (appellees) into its territory" (J.A. 26), and the Points and Authorities in Support of Defendant's (Appellant's) Motion for Summary Judgment, by its reliance upon the fact of the appellee's political allegiance to the Republic of China, apparently grounded deportation upon the fourth sentence of 8 U.S.C. 1253(a), which reads:

"Thereupon deportation of such alien shall be directed to any country of which such alien is a subject (,) national, or citizen if such country is willing to accept him into its territory."

Even so, the issue whether Formosa can be the country in which is located the foreign port at which appellees embarked for the United States, is the same question posed by the first ground. No more need be said here as to that argument, except to say that appellant misreads the language in Clause 2 when he suggests that it "permits deportation to the specific foreign port from which the alien embarked to the United States". The tools of grammar provide other means for uttering that thought.

Appellant's second argument is drawn from a misapplication of the language in Clause 7 of 8 U.S.C. 1253(a). That clause states:

"if deportation to any of the foregoing places or countries is impracticable . . . then to any country which is willing to accept such alien into its territory."

Appellant suggests that the term "places" there reads out of the Act any requirement that deportation be made to a country.

A reading of the entire section, however, does not bear out appellant's contention. The word "place" is used earlier in the identical section as follows:

" . . . Nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject or national of, or had a residence in such designated foreign contiguous territory or adjacent island."

In this context, therefore, the word "places" in Section 7(a) must refer to the "contiguous territory or adjacent places" described in the first paragraph of that section. The reason for this is clear. A subject of the United Kingdom who is from England or Scotland might otherwise arrange for his deportation to islands in the British West Indies and various islands and places adjacent to the United States. 8 U.S.C. 1253(a) bars such deportation. 8 U.S.C. 1253(a) (7) refers back to such "places" because they obviously are not "countries" within the meaning of the Act any more than Formosa is a country.

"An alien who comes from Trinidad", however, contrary to the statement of appellant (p. 17), can be deported to that island, precisely because Section 8 U.S.C. 1253(a), at its second sentence, expressly provides that if he is a "native subject or national of, or had a residence in such designated foreign contiguous territory or adjacent island", he may designate it as the "place to which he wishes to be deported". (Emphasis supplied). At 8 U.S.C. 1101(b) (5), Trinidad is included in the enumeration of "adjacent islands".

Congress has explicitly and clearly chosen its words to include "places" as covering "adjacent islands" and "foreign contiguous territory". In view of both the context of those terms, the differentiation throughout the statute between "countries", "foreign states", "political or territorial subdivisions", and other related expressions, it would be inappropriate for the court to reword the statute in order to supply what the appellant conceives to be its intendment.

Even if there were ambiguity, the provisions here are in aid of deportation. The rule of statutory construction for such legislation, it is well settled, is to adopt the "narrowest of several possible meanings". Fong Haw Tan v. Phelan, 333 U.S. 6, 10. The use of this rule of construction precludes any holding that the term 'country' includes 'places', or 'political or territorial subdivisions'.

CONCLUSION

For the reasons developed above, appellees believe that the holding of the court below should be affirmed.

Respectfully submitted,

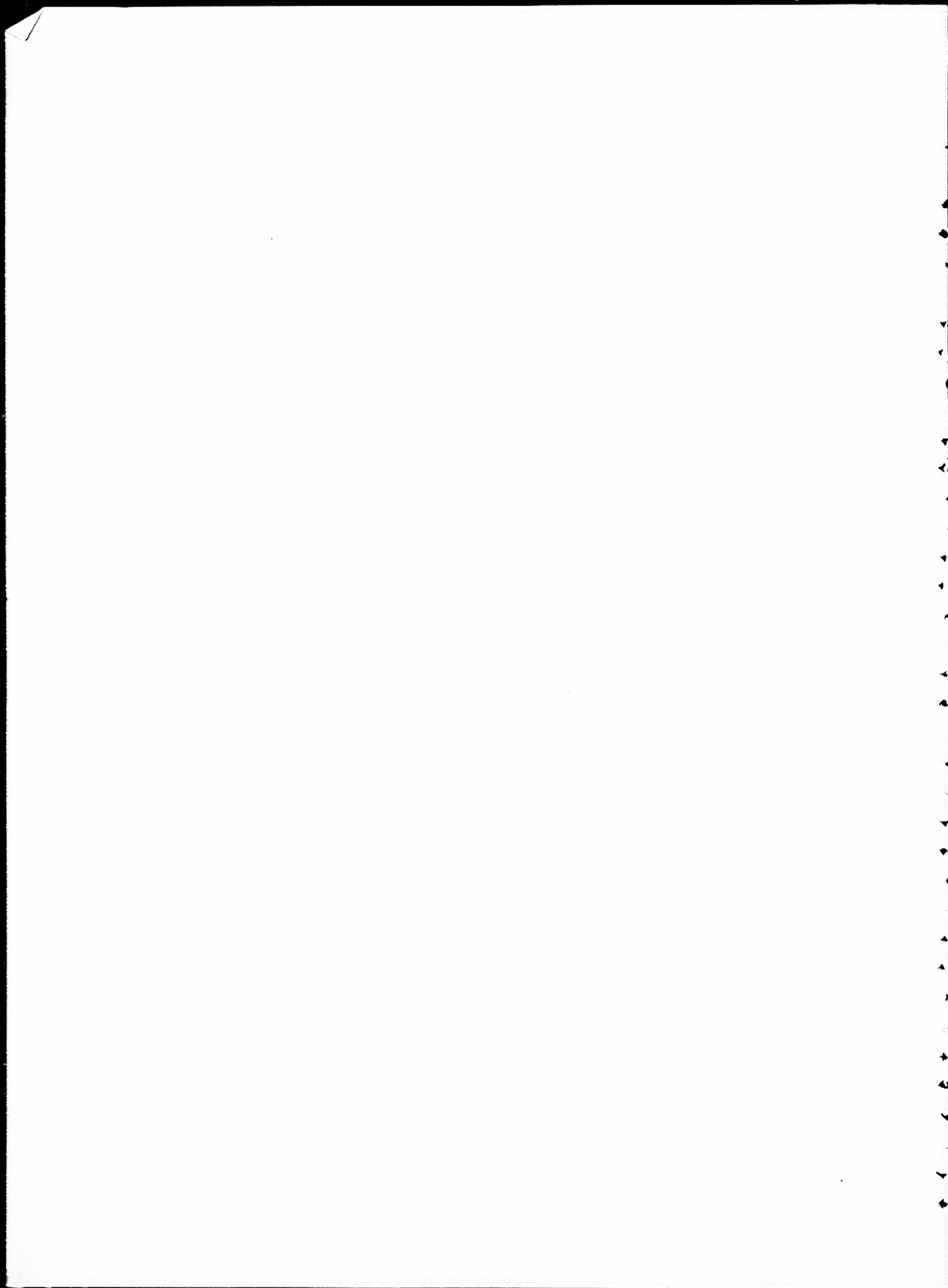
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APPENDIX

STATUTES INVOLVED

Title 8 United States Code, 1253(a) and (b) provides:

Countries to which aliens shall be deported —
(a) Acceptance by designated country; deportation
upon nonacceptance by country.

The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national or, had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either —

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

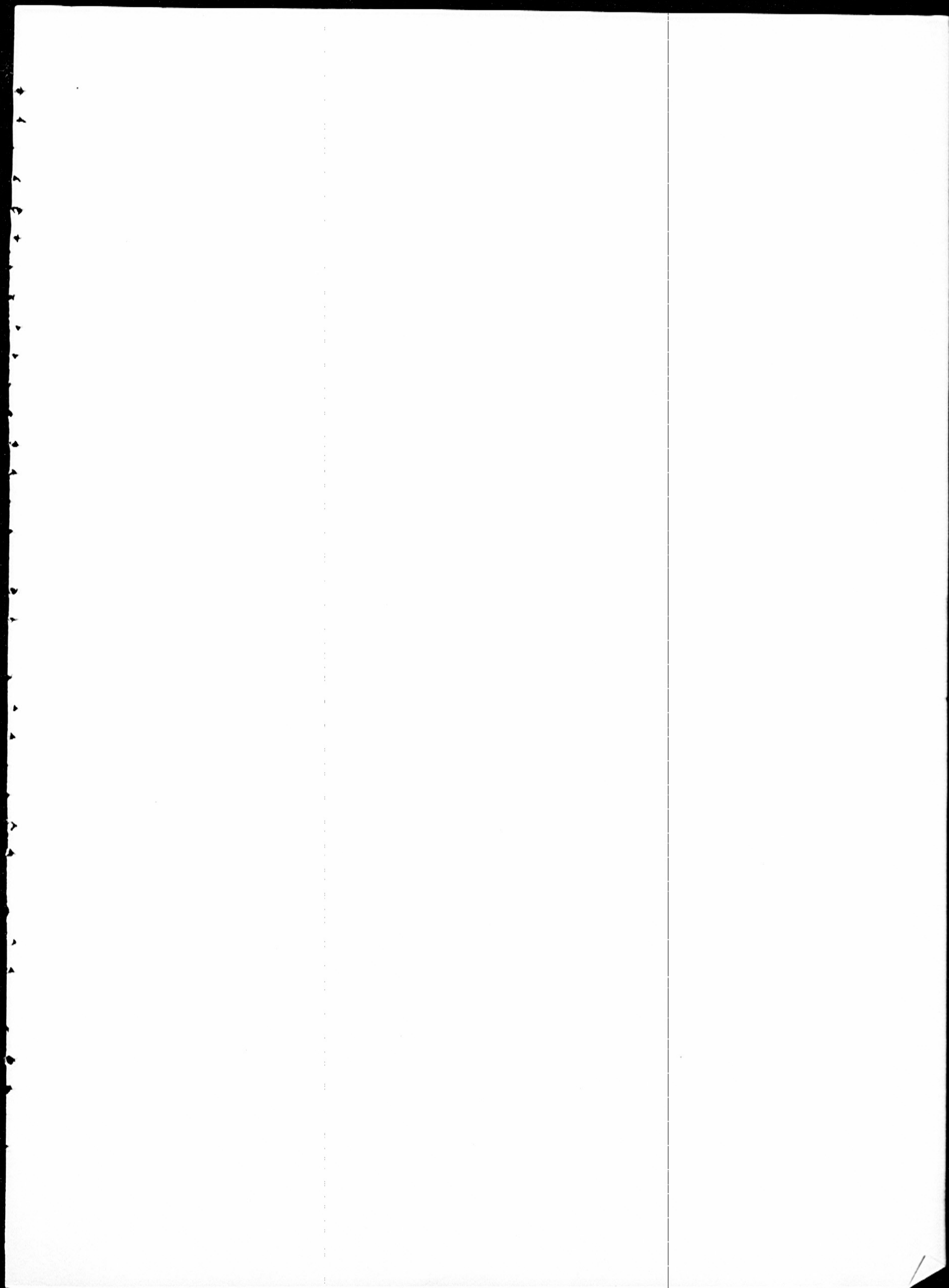
(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

(b) Deportation during war.

If the United States is at war and the deportation, in accordance with the provisions of subsection (a) of this section, of any alien who is deportable under any law of the United States shall be found by the Attorney General to be impracticable, inadvisable, inconvenient, or impossible because of enemy occupation of the country from which such alien came or wherein is located the foreign port at which he embarked for the United States or because of reasons connected with the war, such alien may, in the discretion of the Attorney General, be deported as follows:

(1) if such alien is a citizen or subject of a country whose recognized government is in exile, to the country in which is located that government in exile if that country will permit him to enter its territory; or

(2) if such alien is a citizen or subject of a country whose recognized government is not in exile, then to a country or any political or territorial subdivision thereof which is proximate to the country of which the alien is a citizen or subject, or, with the consent of the country of which the alien is a citizen or subject, to any other country.



REPLY BRIEF AND SUPPLEMENTAL APPENDIX FOR
APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15487

WILLIAM P. ROGERS, APPELLANT,

v.

CHENG FU SHENG AND LIN FU MEI, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

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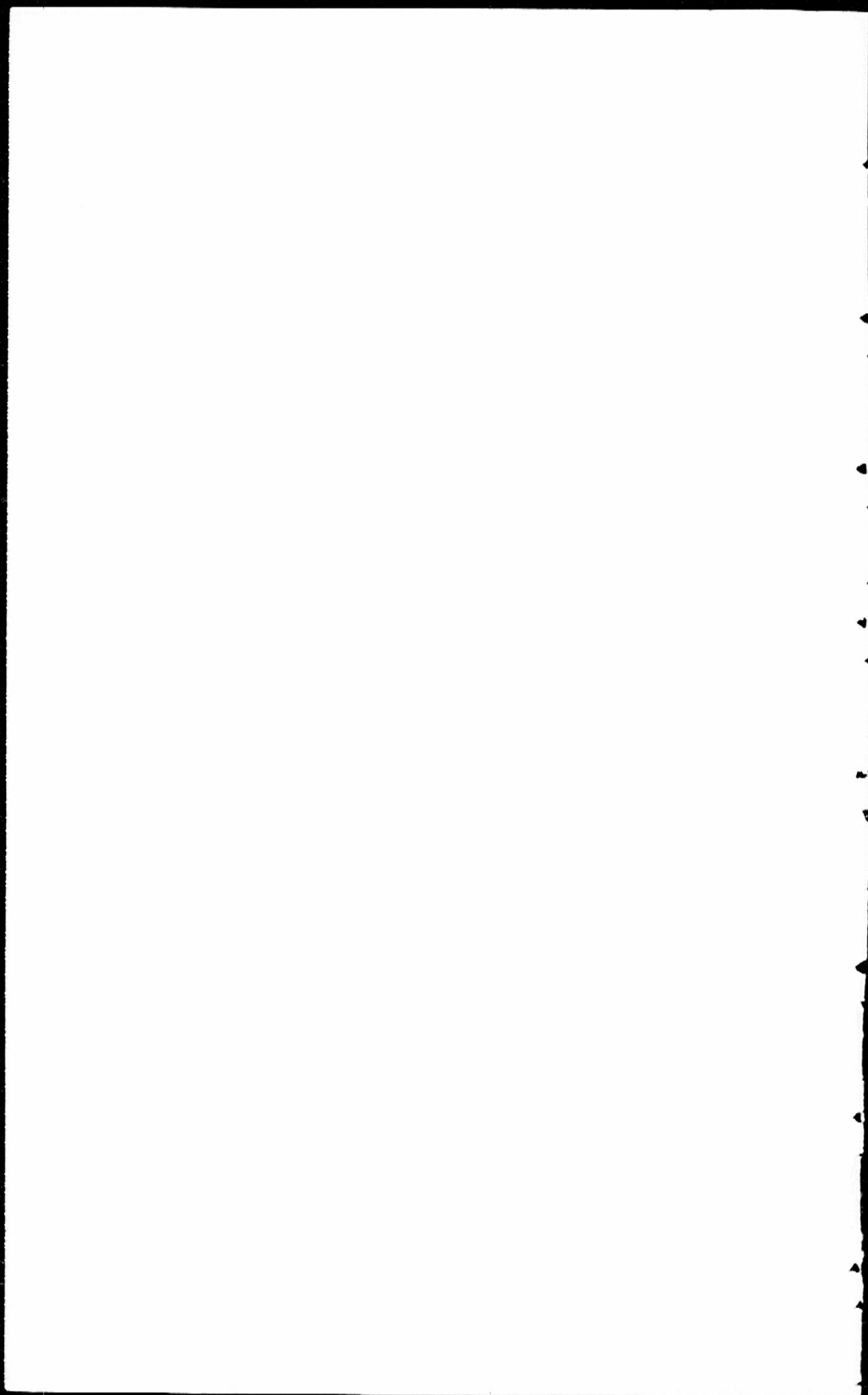
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*United States Court of Appeals
For the
District of Columbia Circuit*

FILED MAR 15 1960

Joseph W. Stewart

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United States Court of Appeals

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

REPLY BRIEF AND SUPPLEMENTAL APPENDIX FOR
APPELLANT

ARGUMENT

I. The "State Department's policy" is consistent with appellant's position

Appellees first seek to refute appellant's contention that Formosa is a "country" within the meaning of Section 243(a) of the 1952 Immigration and Nationality Act, by seizing upon excerpt from a State Department Bulletin (Br. 5), which declares, *inter alia*, "Neither this agreement [Japanese Peace Treaty, effective April 28, 1952] nor any other agreement thereafter has purported to transfer the sovereignty of Formosa to China."¹ Upon this fact and reference to the District Court's dictum that going "beyond the [aforementioned] expressions of the Department of State might cause embarrass-

¹ 39 Department of State Bulletin No. 1017, December 22, 1958, pp. 1005-1011, at 1006.

ment or complications insofar as that Department is concerned" (Br. 5) appellee's conclude (Br. 6):

"In effect, appellant seeks a redetermination by this Court of the State Department's Policy."

This restatement of appellees attempted syllogism, which is devoid of reference to appellant's contentions, suffices to reveal inherent error in their deduction. Quotations, out of context, regarding the scope of existing bilateral agreements do not negate realities which are not, *per se*, formalized in such agreements.

Moreover, appellees' use of the *bare* excerpt from the Bulletin not only advocates appellant has urged a position contrary to the State Department, but also distorts the true and complete "elements * * * of law"² concerning Formosa. When the germane portions of the Bulletin are read, it is patent appellant's position is consistent with declarations of the State Department.

Thus, in his main brief, appellant asserts: (1) "the United States recognizes the Government on Formosa³ as the legitimate government of China, and * * * that is the political power to which appellees owe allegiance;"⁴ (2) the "government [on Formosa] has *de facto* sovereignty or control over the island of Formosa" (Br. 10-11); (3) "Formosa has fixed geographic boundaries and a government [present thereon] having [physical] possession and [effective] dominion over its territory;" and (4) "The United States regards it, and it is treated, as an international person" (Br. 13). Thereafter, appellant again alluded to the *de facto* sovereignty which the Republic of China maintains on Formosa; conceded that Formosa has not been annexed to the mainland of China or the Communist Government thereon, and denied the materiality thereof, thusly (Br. 13):

"The fact that [Formosa's] international status may be unsettled because no final treaties have been signed

² *Id.*, at 1005.

³ The Government on Formosa is the Government of the Republic of China.

⁴ This fact is indisputable from the record.

does not in any way detract from its [de facto] sovereignty or make it less than a country."

A cursory reading of the entire Bulletin makes it abundantly clear that appellant's position referenced above is the true, complete and accurate position of the State Department.⁵

II. The failure to transfer the sovereignty of Formosa to China is indicative of the *de facto* sovereignty of Formosa

As appellant noted, initially, in his main brief (Br. 7), "The issue is not whether Formosa is a part of China [as the District Court decided], but whether Formosa is a country within the meaning of that term as used in the 1952 Immigration Act." The fact that Formosa is not a part of the China mainland or was not ceded thereto is not beneficial to appellees, but is a persuasive factor in support of the proposition that *de facto* sovereignty is exercised by the Republic of China on Formosa. The Greek Government, exiled in England, was a "country" to which a Greek citizen may be deported.⁶ *A fortiori*, the Government of the Republic of China on Formosa, presently under the physical control of no other government, is a "country" to which appellees may be deported within the meaning of the Act. It was because of the "open hostilities" inflicted by the Chinese Communists⁷ upon the "Chinese Government"—the "Government of the Republic of China"—that the latter, recognized by the United States as such, moved its offices about one hundred miles from the China mainland to Taipei, Formosa, which in December 1949, "became the provisional capital of China."⁸ The United States still recognizes the Government of the Republic of China as existing on this same Formosa.

Hence, the geographical location and international status of Formosa, coupled with its physical possession by the Government of the Republic of China, exercising *de facto* sovereignty over the island, recognized by the United States, shows

⁵ *Id.* 1005-1011.

⁶ *Delany v. Moraitis*, 136 F. 2d 129 (4th Cir. 1943).

⁷ People's Republic of China.

⁸ 39 State Department Bulletin, *supra*, at pp. 1006, 1011.

that Formosa is a "country" to which appellees may be deported, within the meaning of the 1952 Immigration Act.⁹

III. The subject matter and terms of the act, legislative history, judicial precedents and subsequent legislation show conclusively that Congress intended Formosa to be a "country" within the meaning of the act

Appellees urge that the term "country" is to be given "the narrowest of several possible meanings" (Br. 21).¹⁰ They would limit the meaning of "country" to one of *de jure* "sovereignty over the territory in question" (Br. 9)—only one of the possible meanings recognized by the Supreme Court in *Burnet v. Chicago Portrait Co.*¹¹ Appellee's would exclude the governmental concept of country (Br. 9) found to exist in *Delany v. Moraitis*, *supra*.

Contrary to appellees' contentions the term "country," like the term "foreign country" is not a *technical* or artificial one, and the sense in which it is used in a statute must be determined by reference to the *purpose* of the particular legislation."¹² (*Italics added.*) The overriding *purpose* of Chapter 5 of the 1952 Act, including Section 243(a), is a mandate to the Attorney General, which is contained in Section 241(a)¹³ providing that certain categories of aliens, which include appellees, "shall upon the order of the Attorney General be deported * * *" In keeping with the mandate of Section 241(a), Section 243(a) provides, with certain exceptions, the order of selecting the "*places or countries*" to which an alien may be deported. See *United States ex rel. Moon v. Shaughnessy*, 218 F. 2d 316, 319 (2d Cir. 1954), wherein the Court, in effect, expressed approval of a deportation to Formosa and held the

⁹ *Delany v. Moraitis*, *supra*. Contrary to appellees' position, the reasoning of the court therein is not restricted to deportations occurring when the United States is at war. 136 F. 2d at 131-132.

¹⁰ *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948), cited by appellant to support this proposition is here misplaced. That case dealt with the rule of construction concerning the existence of two possible *grounds* for deportation—not as here, with the question of where a deportable alien can be sent.

¹¹ 285 U.S. 1, 5 (1932).

¹² *Id.*

¹³ 8 U.S.C. § 1251(a).

term "country" is not necessarily to be given [a] limited meaning." Particularly is this true when, as Judge Matthews ruled subsequent to the instant decision below, "such adoption would tend to achieve and not to defeat the aims [or purpose] of the 1952 Immigration and Nationality Act."¹⁴

The same rule of statutory construction was comparatively recently observed by this Court, sitting *en banc*.¹⁵

"The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the Act will be defeated by strict adherence to its verbiage."¹⁶

The Supreme Court most recently employed the doctrine while construing the wire tapping statute (47 U.S.C. § 605) in *Rathbun v. United States*, 355 U.S. 107, 109 (1957):

"Every statute must be interpreted in the light of reason and common understanding to reach the results intended by the legislature."

Previously, the late Chief Judge Stephens had elaborated upon the doctrine thusly¹⁷ (92 F. 2d at 558):

"If the words of a statute are plain there is ordinarily nothing to construe. The intent of the legislature will be found from the words. If, however, words in themselves plain are inconsistent with the spirit or purpose of an act, they may be construed harmoniously therewith. Also, if extreme hardship will result from a literal application of the words, this may be taken as evidence that the legislature did not use them literally. For such reasons as these permissive words may be given a mandatory meaning and mandatory words a permissive one. These rules are elementary."

¹⁴ *Ying et al v. Rogers* — F. Supp. — (D.C.D.C., C.A. No. 2927-59, decided February 10, 1960), following the complete reasoning of the Supreme Court in *Burnet v. Chicago Portrait Co.*, *supra*, 285 U.S. at 5 (1932).

¹⁵ *Ladrey v. Commission on Licensure, etc.*, 104 U.S. App. D.C. 239, 261 F. 2d 68 (1958), cert. denied, 358 U.S. 920.

¹⁶ *Pickett v. United States*, 216 U.S. 456, 461 (1910); *United States v. Petrillo*, 332 U.S. 1, 7 (1947).

¹⁷ *Ballou v. Kemp*, 68 App. D.C. 7, 92 F. 2d 556 (1937).

Significantly, the Supreme Court said in *Burnet v. Chicago Portrait Co.*, *supra*, at 7:

"In construing legislation providing for the deportation of aliens 'to the country whence they came,' *the place of emigration affords the dominant consideration.*" (Italics added.)

Thereafter, the Court construed its holding in *Mensevich v. Tod*,¹⁸ noting, "The evident *purpose* of the statute determined the significance to be attached to the expression."

In *Delany v. Moraitis*, *supra*, the Fourth Circuit cited *Mensevich v. Tod*, *supra*, as holding that "the term 'country' as used in the statute must be construed, ordinarily, to refer to the *territory* from which the alien came." (Italics added.) 136 F. 2d at 130. The Fourth Circuit noted, however, that possession of territory is not the only criterion, but that the existence of a *foreign government* is necessary for deportation. Otherwise arrangements could not be made therefor. The court also placed emphasis upon the "exercise of foreign power" and recognition of the *government* by the United States as important criteria in determining whether a "country" existed within the meaning of a deportation statute. *Id.*, at 131.

Finally, in sustaining an order of deportation of the alien to the Greek Government in exile in England, the court stated in pertinent part, *Id.*, 136 F. 2d at 132:

"This is not judicial legislation, as suggested by counsel for petitioner. *It is an interpretation of the meaning of the statute as applied to a situation which Congress did not foresee but which the governmental authorities must meet in its application.* "To construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court, to give expression to the intendment of the law". *Armstrong Varnish Works v. Nu-Enamel Corp.*, 305 U.S.

¹⁸ 264 U.S. 134 (1924).

315, 59 S. Ct. 191, 200, 83 L. Ed. 195; *United States v. American Trucking Association*, 310 U.S. 534, 543, 60 S. Ct. 1059, 84 L. Ed. 1345." (Italics added.)

Logic and reason dictate the same principles must apply to appellees' deportation to Formosa, when Congress not only could and did *forsee*, but *knew* that the Government of the Republic of China existed thereon.

Legislative history of the 1952 Act reflects Congress intended to broaden these *countries, places or territories* to which aliens may be deported, so that the number of "undeportables" could be decreased.¹⁹ In subsequent Reports both Houses of Congress referred to § 243(a) of the Act as "Place to which an alien is deported".²⁰ In each instance, Congress interpreted the seven subsections thereof in the following language: ²¹

"If none of the foregoing countries is willing to accept the alien, then the Attorney General is authorized to deport the alien to any of several countries without priority or preference on the basis of such factors as the *point of embarkation, place of birth, place of last residence, the place which had sovereignty over birth-place.*" (Italics supplied.)

Moreover, the legislative history reflects, contrary to appellant's contention (Br. 20), that Congress' use of the word *place* in the second sentence of the section referred to the *countries* of Canada and Mexico, as contiguous to the United States.²² Thus, Congress' reference to "foregoing places or countries" in subsection 7 (8 U.S.C. § 1253(a)) indicates its intention to use the word "country" in a loose sense—"not technical"—and without the "limited meaning" as appellees contend. See *United States ex rel Moon v. Shaughnessy*, *supra*.

The legislative history also reflects Congress intended to *strengthen deportation procedures and to cover prior loop*

¹⁹ S. Rep. No. 1515, *Report of the Committee on the Judiciary*, 81st Cong., 2d Sess. (1950), pp. 637-8.

²⁰ S. Rep. No. 1137, 82d Cong., 2d Sess., p. 31; H.R. Rep. No. 1365, 82d Cong., 2d Sess., p. 59.

²¹ *Id.*

²² See Reports of Congress, footnote 20, *supra*; pp. 31-32, 59, respectively.

holes²³ which, *inter alia*, allowed "iron curtain countries" or "* * * foreign government[s] the power to delay or defeat deportation by reason of the failure of such foreign government[s] to respond to inquiries made by the United States."²⁴ [Italics added.] Time limitations were provided in Section 243(a) as recommended by the Department of Justice, in order to plug the loopholes. Congress also provided penalties for those governments which, by failure to timely answer inquiries, would delay or defeat deportation. Section 243(g), 8 U.S.C. § 1253(g).

The legislative history therefore reflects that Congress also intended the "governmental concept" of "country" to be important. For how else could a "country" respond to an inquiry. Cf. *Delany v. Moraitis*, *supra*. In fact, Section 243(a) leaves no doubt that a "Government of the country" is to indicate its position with respect to accepting a deportable alien "into its territory."

Thus, it appears from the legislative history of the 1952 Act that *place* of emigration is still the "dominant consideration" for purposes of deportation as it was under the 1917 Act. Under the 1952 Act, a government on that *place* is essential in order to indicate a position with respect to accepting an alien. No more is required to uphold the validity of appellees deportation to Formosa.²⁵ The aforementioned rules of statutory construction require the rejection of appellees limited construction of "country", and acceptance of that construction which will achieve the *purpose* of the Act.

²³ See *Joint Hearings before the Committee on the Judiciary*, 82d Cong., 1st Sess. on S. 716, H.R. 2379 and H.R. 2816, pp. 2-3.

²⁴ *Id.*, pp. 714-715.

²⁵ Appellees erroneously contend appellant concedes "sovereignty is the determinative issue" (Br. 7). No such concession was intended by the references alluded to at page 13 of appellant's brief. See Reply, Argument I, pp. 2-3, *infra*. Similarly, appellees err in stating appellant "concedes (at p. 11) that the deportation here is based on 8 U.S.C. § 1253(a) (6) * * *." As appellees acknowledge somewhat inconsistently (Br. 19), Formosa was selected because it is the "country of which such alien is a subject (,) national or citizen * * *" and the government thereon is willing to accept appellees into its territory. Moreover, if Formosa were not such a country, it is certainly "(1) * * * the country from which such alien last entered the United States" or "(2) * * * the country in which is located the foreign port at which such alien embarked for the United States * * *" or "(7) * * * any country which is willing to accept such alien into its territory."

In addition to *Burnet v. Chicago Portrait Co.*, *supra*; *Ying v. Rogers*, *supra*, the reasoning of *Delaney v. Moraitis*, equally supports this view—contrary to appellees contention (Br. 17). In *Delany*, the court stated: “* * * it is well settled that statutes should be construed, if possible, so as to effectuate the purpose intended and avoid absurd consequences.” 136 F. 2d at 131. The *purpose* of the deportation statute is now, as it was then, “to remove from this country an alien who is here contrary to our laws, and place him under the jurisdiction of the political power to which he owes allegiance.” *Id.*

In the instant case deportation of appellees to Formosa is to no less a “country” than in *Delany*. What the court there said respecting the effect of Delany’s deportation is more appropriate here, 136 F. 2d at 133:

[Appellees are being] returned not merely to the *jurisdiction* and *power* of his country, but to the *quasi territory* which they left [and remained in the United States] in violation of our laws. (*Italics added.*)

The nature of Formosa, at least a *territory* in fact, and the recognition of the Government thereon by the United States, long *before* the passage of the 1952 Act, render appellant’s position even more favorable than was the Government’s in *Delany*. Subsequent to Judge Matthews’ decision in *Ying v. Rogers*, *supra*, Judge Miner, sitting in the Northern District of Illinois also entered an order supporting appellant’s position and necessarily that of *Delaney v. Moraitis*, *supra*, in declaring “4 * * * Formosa is a ‘country’ to which an alien may be deported within the meaning of * * * 8 U.S.C. § 1253

* * * 26

The record reflects Formosa is a *place* of foreign *territory*, not contiguous to the United States, which has a *foreign government* thereon in effective control. That Government of the Republic of China has indicated its willingness to accept appellees. Appellees are aliens who went to Formosa with the Government of the Republic of China when the China mainland fell under the Communist regime, served in the

* *Chao-Ling Waong v. Pilliod* (N.D. Ill., No. 58 C 1427, order dated February 19, 1960), (S. App. 12).

armed forces of that Government of the Republic of China, entered the United States in the interest of that Government for additional training as aviators when the Mutual Defense Treaty between that Government and the United States, was, and still is, in existence. When their respective groups returned to Formosa, appellees deserted, and were found deportable.

When it is recalled that the United States recognized the Government of the Republic of China before and after being moved to Formosa; that Congress sought by the 1952 Act to strengthen deportation procedures, plug existing loopholes and to eliminate the number of undeportables; that the Government of the Republic of China had moved to Formosa two years before the Joint Hearings began, and three years before the passage of the 1952 Act, it is inconceivable that Congress intended to plug some loopholes and to *create* another. The situation suggested by appellees, and decided by the District Court, is contrary to the very *purpose* of deportation; militates against logic and common sense, and does violence to the intent of Congress.

That this is so conclusively appears from legislative action in Congress *subsequent* to enactment of the 1952 Act, concerning appellees' request for adjustment of status under the Refugee Relief Act of 1953, as amended 67 Stat. 403; 68 Stat. 1044. Pursuant to a resolution²⁷ opposing the granting of permanent residence to appellees, the House Judiciary Committee reported, through Mr. Walter,²⁸ in pertinent part:

"The United States admits annually a considerable number of military personnel of *allied nations*, coming for training purposes and for military staff work connected with U.S. defense installations. It is the committee's considered opinion that to agree that *any national* of a *country* allied with the United States in the mutual defense effort could be granted permanent residence in the United States on the ground that he

²⁷ H.R. Res. No. 384, 86th Cong., 1st Sess.

²⁸ H.R. Rep. No. 1176, 86th Cong., 1st Sess. Mr. Walter is the same Congressman who introduced bills in the House of Representatives, sat on the Joint Hearings, and filed Reports which culminated in the enactment of the 1952 Act. See sources in footnotes 20 and 23, *supra*.

considers himself a refugee from his *own country*, would be highly injurious to the conduct of foreign relations of this country and the very structure of our alliances as expressed in the various mutual security treaties and arrangements. Moreover, the committee does not believe that any *national* of a *country* of the free world allied or associated with the United States in a common effort designed to stem the tide of Communist tyranny may be considered a refugee within the meaning of this term as it is used in the laws of the United States.

"Consequently, the committee recommends that the resolution (H. Res. 384) do pass." (Emphasis supplied.)

Thus, the Committee left no doubt that Formosa, in the interpretation of Congress is, and was intended to be at the time of enactment of the 1952 Act, a "country" within the meaning thereof.

Prior thereto, it appears that the Ninth Circuit²⁹ assumed that Formosa, insofar as appellees are concerned, is a "country" within the meaning of the Act. In pertinent part the court stated:

"... it is unnecessary for us to determine *which* [China or Formosa] is the *country* of nationality or last residence. (Italics added.)

Hence, from the subject matter and terms of Section 243(a), rules of statutory construction, legislative history, judicial precedents, and subsequent legislative action, Formosa is, and was intended to be, a "country" within the meaning of the 1952 Act.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be reversed.

OLIVER GASCH,
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CARL W. BELCHER,
HARRY T. ALEXANDER,

Assistant United States Attorneys.

²⁹ *Sheng and Mei v. Barber*, 269 F. 2d 497 (9th Cir. 1959), Judge Bazelon sitting and writing the opinion for the Court.

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT
OF ILLINOIS, EASTERN DIVISION

(No. 58 C 1427)

CHAO-LING WANG, PLAINTIFF

v.

ALVA L. PILLIOD, DISTRICT DIRECTOR, CHICAGO DISTRICT, U.S.
DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION
SERVICE, DEFENDANT

ORDER

This matter coming on to be heard on defendant's motion for summary judgment, and the Court having had the benefit of counsels' oral argument and argument on briefs and having considered the entire record filed herein as a whole, and having weighed the contentions of both parties:

The Court does hereby find:

1. That it has jurisdiction over the subject matter and the parties herein;
2. That the Order of the Attorney General, appealed in Count I of Plaintiff's Complaint, refusing to withhold deportation on the ground that plaintiff would suffer physical persecution if deported to Formosa, is unsupported by substantial evidence;
3. That the failure of the Attorney General or his delegate to introduce at plaintiff's interrogation any other pertinent evidence or available information in denying plaintiff's petition to withhold deportation to Formosa pursuant to Section 243 (h) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253(h), constitutes a denial of due process of law guaranteed plaintiff by the Fifth Amendment of the Constitution of the United States;

(12)

4. That Formosa is a "country" to which an alien may be deported within the meaning of Section 241 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253, and therefore the Order of the Immigration and Naturalization Service directing that plaintiff be deported to Formosa appealed in Count II of Plaintiff's Complaint, is valid;

IT IS THEREFORE ORDERED AS FOLLOWS:

1. That defendant's motion to dismiss and for summary judgment as to Count I of Plaintiff's Complaint be and the same is hereby denied;

2. That defendant's motion to dismiss and for summary judgment as to Count II of Plaintiff's Complaint be and the same is hereby granted;

3. That this cause be and the same is hereby remanded to the Immigration and Naturalization Service for the purpose of taking further action in conformity with the findings and orders contained herein;

4. That defendant, Alva Pilliod, District Director, Chicago District of the Immigration and Naturalization Service is hereby restrained and enjoined from taking any action to deport plaintiff to Formosa until further order of court.

ENTER:

/s/ JULIUS H. MINER,
Judge.

Dated at Chicago, Illinois
this 19th day of February,
A. D. 1960.